THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, FEBRUARY 12, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

LIEN FOR STREET-PAVING IN FRONT OF CEMETERIES.—We print elsewhere a novel and important decision on this subject recently made by the Court of Appeals of Kentucky, in City of Louisville v. Nevin. It was an application in the chancery court to decree the sale of a lot used as a Catholic cemetery in the city of Louisville, to enforce a lien for regrading and repaving the street in front of it. The court hold that such a sale will not be decreed; because there is a statute in Kentucky making it a criminal offence to disturb the resting place of the dead, and therefore the purchaser could put the property to no lawful use which would be of any possible benefit to him. We do not recall any case similar to this. An able disquisition on the law of cemeteries will be found in the report of Hon. Samuel B. Ruggles, referee, in Matter of Beekman Street, 4 Bradf. (N. Y.) 503. For this opinion we are indebted to Hon. Lewis McQuown, of Glasgow, Kentucky.

The Supreme Court of the United States.

On the 5th of January a bill was introduced into the senate, by Mr. Edmunds, to facilitate the disposition of causes in the Supreme Court of the United States. It was referred to the judiciary committee, and has been reported back to the senate, with amendments. These amendments may be recognized in the following draft of the bill, by noting that the words or figures in brackets are to be striken out, and that the words in italics are to be inserted:

A BILL to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes.

Be it enacted by the senate and house of representatives of the United States of America, in Congress assembled, that the Circuit Courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. *And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five, and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law.* The review of the judgments and decrees entered upon such findings by the supreme court, upon appeal, shall be limited to a determination of the [sufficiency of the facts found to support the judgments or decrees entered] *questions of law arising upon the record*, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law.

SEC. 2. *That said courts, when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the supreme court, and submit to them such questions of fact arising in such cause as such circuit court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings.*

SEC. [2] 3. That whenever, by the laws now in force, it is required that the matter in dispute shall exceed the sum or value of two thousand dollars, exclusive of costs, in order that the judgments and decrees of the Circuit Courts of the United States may be re-examined in the supreme court, such judgments and decrees hereafter rendered shall not be re-examined in the supreme court, unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs.

SEC. [3] 4. That this act shall take effect on the first day of May, eighteen hundred and seventy-five.

The measures of relief proposed by this bill, so far as they go, seem wise and judicious. The only doubt we should feel as to any of them, would be as to the provision which raises the pecuniary limit of jurisdiction of the court to five thousand dollars. This measure would seem objectionable on account of its tendency to make it an aristocratic court—a court for rich litigants exclusively, and to remove it still farther from the people. But even this measure, objectionable as it seems to us, may be one of those in which propriety must yield to the necessity of the case. Moreover, it must be remembered that the purchasing power of five thousand dollars is not greater than two thousand at the time the present limit to the jurisdiction of the court was established.

The provision which cuts off the examination of questions of fact in admiralty, seems also eminently wise. Much good sense will likewise be discerned in the clause which provides for jury trials in admiralty cases. The power to summon juries in such cases, will, if it does not advance the ends of justice, at least relieve the district judges of a great strain. We presume that the provision which permits a jury in admiralty to consist of as few as five men, is designed to enable the supreme court, should it deem wise to do so, to provide by rule for the empanneling, in certain cases, of juries of experienced navigators. If this is its object, it seems to embody an idea happily conceived.

The chief objection to the bill would seem to be, that it does not go far enough. It leaves the supervisory power of the court over the Supreme Court of the District of Columbia and the territorial supreme courts, where it now is. It is possible, considering that the Supreme Court of the District of Columbia is located at the national capital, and that its jurisdiction is in some respects peculiar, that this is as it should be, so far as that court is concerned. But there would seem to be no reason why the supreme courts of the territories should not be made to stand alone, and to feel their independence, dignity and importance. These courts are of equal ability with some of the state supreme courts, and, it would seem, are equally capable of occupying the position of courts of "last resort." Still, there are doubtless reasons supporting a contrary view, which we do not understand.

It should be remarked that this bill, if it becomes a law, will greatly increase the importance of the circuit courts, by raising to five thousand dollars the limit of their final jurisdiction. For, whatever may be said to the contrary, it is true that, no matter how great the ability of a court, the value of its decisions as authority for other courts is greatly enhanced by the fact that they are final, and not subject to review. And there is much good sense at the bottom of this; for it is a matter of common experience, that when a cause is brought before a court which has "the last guess," it is prepared for hearing and argued with much greater industry and skill, than where the effort is known to be merely a preliminary skirmish, preparatory to the final battle before another tribunal. The judges are thus aided to a much greater ex-

tent by counsel, and, knowing that their decision is final, feel to a much greater extent the responsibility of their position, and hence consider and investigate the questions involved more thoroughly before they pass upon them.

On the whole, we earnestly hope Mr. Edmund's bill will become a law before the present session of Congress adjourns.

Testimony of the Plaintiff in an Action of Criminal Conversation.

While that relic of barbarism in the common law, of prohibiting and disqualifying a wife from giving testimony for or against her husband, and the husband from testifying for or against his wife, still continued in its most rigorous and available form, that enlightened reformer, who has given wise dissection and counsel to the world on the great question of morals, jurisprudence and religion, Jeremy Bentham, forcibly enunciated the sounder doctrine, that it was injurious to the best interests of society; that the rule, which was engrafted in the law in the feudalic ages, and blindly adhered to, should no longer be continued, but that it ought to be wholly and entirely uprooted and eliminated from the law of evidence. He argued upon this vantage ground, that it would be salutary to society at large to abolish the rule, as it would compel men and women to be purer, and more wisely prompted to preserve their innocence; and that the more deeply the impression it makes upon mankind the more effectually it answers its intended purpose. While his generalizations are logical and tended to advance the world in the direction indicated, still, legislation, which is in the main wiser than the individual, has seen fit to fix a mean, a limit upon the degree or extent of allowing testimony on the part of husband and wife, even in civil actions.

Among the great variety of issues on the law and rules of evidence which have been propounded and argued in the notorious trial now depending in Brooklyn, wherein Theodore Tilton is plaintiff and Henry Ward Beecher defendant, in an action founded upon the charge of criminal conversation, none has waxed so edifying and interesting to the legal profession as that raised a few days ago, upon the plaintiff being called as a witness in his own behalf. The senior counsel for the defendant, in his mild and courteous way, objected to his admissibility, and at once proceeded to address the court and adduce abundant authorities and cogent argument to prove that the plaintiff was wholly incompetent to testify. In the course of his elaborate remarks, William M. Evarts cited many standard English authorities to show how completely and certainly the common law, from policy of good morals and otherwise, excluded the testimony of parties standing in the relation of husband and wife, and where the testimony of either would reflect injurious upon the other. During his argument he read from numerous authorities which appositely bore upon the subject at issue. He cited both English and American text writers, and many adjudicated cases, among which were Bacon's Abridgment; Best; Chief Justice Lee, the able successor of Lord Hardwicke; Cord's Rights of Married Women, wherein it is held that—"The declarations of the wife are not evidence for the husband, and in an action for criminal conversation, the wife's confessions are not evidence for the husband;" Coke upon Littleton; Espinasse; Gilbert (on evidence), who declares that, "The rule of exclusion of husband and wife is grounded on the identity of interest on public policy;" Greenleaf, who says that communications between husband and wife belong to privileged communications; 2 Kent's Com. 178; Peake on Evidence; Phillips on Evidence; Reeves on "Domestic Relations," wherein it is said, that the principle of the rule arises from that anxious solicitude which the law discovers to preserve domestic tranquillity; 2 Rolle Abr. 686; Schouler's Domestic Relations, 709.

In 3 Dougl. 422, Bently v. Cooke, Lord Mansfield observes, in effect, that there has never been an instance either in a civil or criminal case, where the husband or wife has been permitted to be a witness for or against the other, except in case of necessity. The King v. The Inhabitants of Cliviger, 2 Durnford & East, 263.

Some of the American cases cited were, Stein v. Bowman, 13 Peters 209, in which Mr. Justice McLean delivered the opinion of the court, which was concurred in by Justice Thompson, Story and Ch. J. Taney. The case was one where the wife was produced as a witness to show that certain statements made by her deceased husband were untrue. The court says, "The law does not seem to be entirely settled how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. Nor whether in such a case she may not be asked questions as to the facts that may in some measure tend to criminate her husband, but which afford no ground for the foundation for a prosecution. The decisions which have been made upon these points seem to have been influenced by the circumstances of each case, and they are somewhat contradictory. It is however admitted in all the cases that a wife is not competent, except in cases of violence upon her person, directly to criminate her husband or to disclose that which she has learned from him in their confidential intercourse."

Mr. Evarts also cited Babcock v. Booth, 2 Hill, 181, where an elaborate opinion is given by Judge Bronson; Burrill v. Bull, 3 Sandford Ch. 15; O'Connor v. Majoribanks, 6 Lond. Jur. 509; Hasbrouck v. Vandervoort, 9 N. Y. 153; Davis v. Dinwoody, 4 T. R. 678; 4 Manning & Granger, 435; 10 Eng. L. & Eq. 596; The People v. Mercein, 8 Paige 50; 11 East. 132; The State v. Herman, 13 Iredell, 502, and Dennison v. Page, 29 Penn. St. 420.

In Southwick v. Southwick, 49 New York, 510, the questions involved being analagous to the case at bar, were pretty thoroughly discussed, as tending to show the bearing of the common law upon it.

The legislature of New York state has varied the common-law rule, and, by statute passed in 1867, Session Laws, page 2221, which is intended to moderate and qualify, on matters of interest, the exclusion of husband and wife in testifying for or against each other. The learned counsel cited the case of Dann v. Kingdom, 1 N. Y. Sup. Ct. R. 492, and said:

We have now this state of things, and I need only ask your honor's attention to the decision of the general term of the supreme court of this state, in the fourth department, since the passage of this act, and in a *crim. con.* case. Now, the single fact to which the plaintiff was proposed to be called as a witness in this case of Dann and Kingdom (a plaintiff standing as Mr. Tilton stands here), was to prove the marriage between him and his wife. That is not a question arising in the confidence of marriage. A marriage is always celebrated in the face of the church and the world; therefore, the proof of that fact did not come within any reason or any rule of exclusion from its arising in the confidence of marriage. It happened to be a very grave, prac-

tical question for the plaintiff. The marriage, we may suppose, was in common or humble life, and had occurred before a justice of the peace, and doubtless without any troops of attendants and friends; and the justice of the peace was dead, and the record or certificate which the law requires, and permits to be authentic when conformed to law, when produced was found to be defective, and it could not be used; and the plaintiff stood apparently as the witness that must prove the marriage, or it could not be proved at all, and he offered to prove it, and by the rules of the common law, aside from the marriage relation, he, of course, was a good witness: it occurred in his presence; he was attending to the subject, and knew all about it. He was excluded, and every effort of counsel, either arguing upon a change of policy, or upon statutory efficacy of the legislation of 1867, by which this witness could be called for that single fact and act, was overruled by the court.

The senior counsel on the part of the defence closed his able argument on the motion of excluding the plaintiff, Mr. Tilton, by averring it to be a question of law, not of fairness, and that by all precedents bearing directly upon the issue he was incompetent.

For days previous to the presentation of Mr. Tilton, as a witness in his own behalf, it was well known to the counsel for the plaintiff that strenuous objections would be raised to his being made a witness, and accordingly, the defence were ready with argumment and authority to refute any objections which might be presented. So that the argument of Mr. Evarts being closed, Roger A. Pryor, one of the senior counsel on the part of the plaintiff, he who attended to the motion raised on the question of the admissibility of a bill of particulars in the case, which was heard a month ago before the Court of Appeals, wherein it was finally decided that the service of a bill of particulars could not legally be compelled, —arose to answer the argument, and to speak in favor of the competency of Mr. Tilton as a witness in the case.

In his fluent, easy style, though earnest in the extreme, he took up the points that had been touched upon by the opposite counsel, and proceeded to cite authorities to substantiate his position. He called the attention of the court to Lord Denman's act of 1843, which abrogated the disability of a witness arising from interest and infamy; Lord Brougham's act in 1850, wherein the disability growing out of the relation of the parties was removed; and the act of Lord Campbell in 1853, which abolished the incompetency of coverture; and then coming down to legislative acts of New York state, he said:

Impelled by the same principle, and running along the same line, and by the same stages to the same end, was the legislation of this state. Hence, in 1846, by constitutional ordinance, the incapacity to be a witness, arising from defect of religious principle, was abolished. In 1848, the incompetency of interest was abolished. In 1857, the incompetency of a party to the action was abolished. In 1867, the incompetency arising from the relation of husband and wife to testify for and against each other was abolished; and subsequently we have attained, in this enlightened and humane course, to the degree that now a criminal, indicted, is admitted to testify on his own behalf.

The phraseology of the act of 1857, is as follows: "A party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness." That act, innovating upon the traditional principles of the common law, and so doing affront to all the prejudices of the profession, was subject to discussion, and to judicial construction. A large number of cases were decided determining the meaning and effect of the act of 1857. The first case was that of Potter v. Marsh, 30 Barb. 506, in 1860, an action of slander against husband and wife for defamation of plaintiff by defendant's wife. Both defendants offered themselves as witenesses—first, each in his own behalf, and then each for th other. The court excluded the witnesses, and the plaintiff had a verdict. At General Term the court reversed the judgment, and this doctrine was affirmed by the court of appeals in 1863. *Vide* 24 How. Pr. Rep. 610, note. See also on this point Wehrkampt v. Willett, 4 Abbott [?], and 1 Keys Rep. In Barton v. Gledhill, 12 Abbott, 246, the same doctrine was upheld. *Vide* Code of Procedure, 399. See also Chamberlain v. People, 23 N. Y. 85; Hooper v. Hooper, 43 Barb. 297, and Hall v. Hall, 30 How. Pr. 59.

The last case cited shows that husband or wife, parties to the action, are not competent witnesses for or against each other, yet still in such case each is admissible to testify in his or her own behalf.

White v. Stafford, 35 Barbour [?], 419, rules that a wife, not a party to the action, was not then a competent witness for the husband; but that under section 399 of the code, the act of 1857, all parties to an action are competent in their own behalf.

Card v. Card, 39 N. Y. 317, holds that section 399 of the Code makes "a party to an action a competent witness in his own behalf, though associated on the same side with his wife as a party." (Opinion by Woodruff, J.) Also see Shirley v. Vail, 30 Howard Pr. [?] 407, Court of Appeals, per Grover, J.

Smith v. Smith, 15 Howard, Pr. 165, was a suit by a wife for divorce, on the ground of adultery, and the plaintiff was admitted as a witness. Held, error; for the act of 1857 qualifies parties to an action as witnesses, yet it does not enable husband or wife to testify one against the other, in an action between them.

In Maverick and wife against the Eighth-Avenue R. R. Co., 36 N. Y. 378 (1867), it was held, "that the husband, as a party, was a competent witness for himself, though suing jointly with the wife. The language of the court there is extremely applicable and cogent upon the present discussion.

The astute counsel also adverted to Carpenter v. White, 46 Barbour, 292 (1866), which decides that in an action of *crim. con.*, the wife is an incompetent witness, not being either nominally or really a party to the action. In such action, the husband is the only party in interest.

Babbott and wife v. Thomas, 31 Barbour, 277 (1859), was an action by husband and wife to cancel a bond and mortgage and to restrain the foreclosure of the mortgage. The husband offered himself as a witness to prove usury in the consideration. Held, that the husband was a competent witness in his own behalf, notwithstanding the wife's interest in the event of the suit, by reason of her inchoate right of dower in the mortgaged premises.

In Schaffner v. Reuter, 37 Barbour, 44 (1862), it was ruled that, when husband and wife are co-defendants, she is a competent witness in her own behalf.

In Matteson v. N. Y. C. R. R. Co., 62 Barbour, 364 (decision in 1862), affirmed by the court of appeals, 35 N. Y. page 487, it was held that husband and wife are competent witnesses for and against each other in all cases where they are parties to the action.

The deductions derived from the above decisions, some of which were rendered in the court of last resort, illustrate that

a party to an action, being husband or wife, in every and in any action, *when the husband and wife is not also a party to the action*, be he or she husband or wife, is a competent witness in his own or her own behalf.

The argument thus presented seemed to be valid, cogent and palpable, as showing that the proposed party plaintiff as a witness was admissible and competent. And thus it is apprehended that the act of 1867, contemplates the witness in his marital relation, and provides, when he may and when he may not testify against the other, husband or wife, as the case may be.

In the case of Bunnell v. Greathead, 49 Barbour, 106, which was a case of criminal conversation, wherein the plaintiff propounded himself as a witness, he was accepted and admitted as a witness, and alone testified to the fact of the wife's adultery. The case of Petrie v. Howe, decided in 1874, 4 New York Supreme Court Reports, 85, was an action of criminal intercourse—a peculiar case. There the plaintiff was admitted as a witness, and no question raised on appeal that he had been improperly admitted, by virtue of the act of 1867. In 1 Phillips upon Evidence, 69, a note, No. 40, written by the late Judge Cowen, says: "Indeed, it would seem to be now the settled doctrine, both on authority and principle, that husband and wife may be received to contradict or criminate each other in a collateral matter, *i. e.*, in all cases *except* where one is called to contradict or criminate the other *as a party to some fraud.*"

After citing some New Jersey authorities, the counsel concluded his quite exhaustive argument, by saying:

The common law left adultery to the cognizance solely of the ecclesiastical courts, who chastised it *pro salute animæ*, as they expressed it. Adultery never was a crime by the law of New York; is not a crime to-day with us. It is regarded as a private wrong, exposing the *tort feasor* to an action for civil damages, but it was never considered a penal offence making him obnoxious to a criminal prosecution. Hence, although the rule contended for by the learned gentleman be sound in all its parts, yet it is inapplicable here, because the testimony which the plaintiff may give, and will give, though tending to convict the wife of adultery, does not tend to accuse her of a criminal offence. So that for those reasons, without detaining you with any amplification of this argument, the second ground presented by the learned gentleman wholly fails—fails because, if sound, it does not go to the competency of the witness, but to the admissibility of the testimony he may give—inapplicable, because it does not tend to convict the wife of a criminal offence, and inoperative because, in truth, it is not the law of the state of New York.

No sooner had Mr. Pryor closed, than the senior counsel for the plaintiff, Mr. Beach, began, and with clear, logical and telling eloquence, presented the law of the case on the issue involved, and for three hours enchained the earnest attention of the court and auditory.

Adverting at length to the case of Marsh v. Potter, above referred to, involving the competency of witnesses, he quoted from Justice James' opinion, among others, where he says:

With respect to the protection of confidential communications between husband and wife there is good reason for such protection at all times. * * *

The decisions excluding husbands or wives of parties are often accompanied with sacred declarations in favor of such protection; but is the exclusion extended to all the testimony, whether it was confidential or not? and, as no protection was given to conjugal confidence in respect to witnesses, these parties were as much within the reason of the rule, as it existed, as the other class, it may be safely affirmed that no such rule has as yet been established.

After an analytical review of the several cases cited by the opposition, and after a general review of the interests involved in the decision which the court would render, the able and eloquent counsel closed his plea by saying:

I can but repeat the spirit of the argument which my learned colleague and myself have addressed to you. I can but implore you, out of regard for the great interests involved in your decision of this question, out of regard for those great questions of law and of public policy which are necessarily involved in the discussion and in the decision, to examine it with deliberation and care (if the attention of your honor has not already been directed to this question), and to give us a decision which shall be in harmony with the spirit, if I may call it, of our present civilization; a decision which shall not stand in repugnance to the principles which have been announced so repeatedly, so emphatically, by the highest courts of our state.

The senior counsel for the defence then answered the arguments of the plaintiff's counsel, and the case, late on the afternoon of the 29th day of January, upon the legal questions involved, was submitted to the presiding judge for his decision. It will be observed, that the question being as to how far the innovation of the common law was affected by the statute of 1867, of New York, makes it a close and interesting issue. Promptly, upon the opening of the court on the following Monday morning, Judge Neilson, after a thorough examination of the question of admitting the plaintiff as a witness, and in a carefully prepared opinion, decided, *first*, that the plaintiff is competent to be sworn and to testify on his own behalf: *Second*, that as to the principal question at issue, he is not competent to testify to any confidential communication. The decision seems to be in all respects sound, and upheld by the more recent authorities.

NEW YORK, Feb. 1, 1875. JOHN F. BAKER.

[NOTE.—In verifying the citations in the above paper, according to our custom, we find two or three erroneous citations of cases which we have not been able to trace. The error doubtless originated with the short-hand reporters. We have indicated them with an interrogation point.—ED. C. L. J.]

State Taxation of Union Pacific Railroad Land Grant.

THE UNION PACIFIC RAILROAD COMPANY, APPELLANT, v. EDWARD C. McSHANE, TREASURER, ETC., *ET AL.* EDWARD C. McSHANE, TREASURER, ETC., *ET AL.* (CROSS APPEAL) v. THE UNION PACIFIC RAILROAD COMPANY.

Supreme Court of the United States. Nos. 491 and 492—October Term, 1874.

1. **Exemption of Union Pacific Railroad Lands from State Taxation—Case Modified.**—The Railroad Company v. Prescott, 16 Wall., 603, modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company to constitute an exemption of those lands from state taxation.

2. **The Same.**—But affirmed so far as it holds that lands on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from state taxation.

3. **The Same.**—But where the government has issued the patent, the lands are taxable, whether payment of those costs have been made to the United States or not.

Appeals from the Circuit Court of the United States for the District of Nebraska.

Mr. Justice MILLER delivered the opinion of the court.

These are cross appeals from a decree of the Circuit Court for the District of Nebraska, in a suit in equity brought by the railroad company to enjoin the defendants, who were treasurers of counties in the state of Nebraska, from the collection of taxes assessed on the lands of the company.

The bill alleges that in the year 1872, the assessors of the several counties where the lands are situated, which lands are described in lists filed as exhibits with the bill, assessed said lands, and the boards of commissioners of said counties levied taxes for state, school, and local municipal purposes upon them, and that the

treasurers, who are made defendants, were about to proceed to the collection of those taxes by seizing and selling the locomotives, cars, and rolling-stock generally of the company, with other personal property. They say that the lands were not liable to any state taxation at the time of the assessment or levy, and they pray that these treasurers who are made defendants may be enjoined from further proceedings for their collection. The grounds on which this exemption is claimed may be divided into three distinct propositions, some of which are applicable to all the lands, and others to only part of them.

1. That by the 3rd section of the act of 1862, under which the company was organized, and by which the lands within the ten-mile limit were granted in aid of the construction of the road, it was provided that all such lands as should not be sold within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not to exceed one dollar and twenty-five cents per acre, to be paid to the company. And it is alleged that these lands are liable to this pre-emption, which would be defeated by a sale of them for the taxes.

2. That by the amendatory act of 1864, which extends the grant to twenty miles on each side of the road, it is provided that before any of the land granted shall be conveyed to the company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, and that these costs not having been paid, a sale for taxes would defeat the right of the United States to enforce this claim and recover their expenses out of the lands.

3. That under the joint resolution of April 10, 1869, authorizing the President to appoint a commission to enquire into the manner in which the road had been constructed, and, if the report was unfavorable, to take steps to secure its proper construction, the secretary had refused to issue patents for these lands, withholding the title as security for the performance of what was required in that respect.

Without referring to the answer at present, we will take up these several points, and in examining their legal bearing on the case, will at the same time, where it is necessary, enquire how far they are supported by the facts of the case, and will then look into the other matters set up by way of defence.

The first and second of the propositions above stated are supposed to find sufficient support in the case of Railroad Company v. Prescott, 16 Wall. 603.

That was a suit by the Kansas Branch of the Union Pacific Railroad Company to have declared void a sale of some of its land for taxes, made under state authority, and this court granted the relief on the ground that the land was not liable to taxation at the time it was assessed for the taxes under which it had been sold. No patent had been issued to the company when the taxes were assessed, and the costs of surveying the land had not been paid to the government by any one. This court reaffirmed the doctrine that lands which had constituted a part of the public domain might be taxed by the states before the government had parted with the legal title by issuing a patent, but that this could only be done when the right to the patent was complete, and the equitable title fully vested in the party, without anything more to be paid, or any act to be done going to the foundation of his right. And it said that in that case the United States had a right to retain the patent until the costs of surveying the land had been paid, which had not been done, and that the right of pre-emption in lands unsold by the company within three years after completion of the road, would be defeated if a sale for state taxes could be made which would be valid.

This latter ground was not necessary to the judgment of the court, as it rested as well on the failure to pay the costs of surveying the land. And we are now of opinion, on a fuller argument and more mature consideration, that the proposition is not tenable.

The road was completed and accepted by the president in May, 1869, and these lands have been subject to such pre-emption since three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the interior department. We do not now purpose to decide whether any such legislation or other action is necessary, or whether any one having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of Railway Co. v. Prescott, asserts a different doctrine, it is overruled.

But the proposition that the state cannot tax these lands while the cost of surveying them is unpaid, and the United States retains the legal title, stands upon a different ground.

The act of 1864, section 21, declares that before any of the lands granted by this act shall be conveyed to the company, there shall first be paid in the treasury of the United States, the cost of surveying, selecting, and conveying the same.

That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done without which the company is not entitled to a patent. The case, clearly, is not within the rule which authorizes state taxation of lands, the title of which is in the United States.

The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the states to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation, and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose.

But when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing the payment of these costs.

It is by retaining the title that the payment of costs of survey is to be enforced. And so far as the right of the state to tax the land is concerned, we are of opinion that when the original grant has been perfected by the issue of the patent, the right of the state to tax, like the right of the company to sell the lands, has become perfect.

As already stated, part of the lands in dispute have been patented, and part of them have not. And the circuit judge in his opinion and decree divides them into the patented and the unpatented lands, and we concur in his opinion that there is no reason why the patented lands should not be taxed.

As to those which are not patented, it may be assumed from the evidence in the case, that on none of them have the costs of survey been paid or tendered to the United States, and if they are all subject to that provision of the act of 1864, they are not liable, on the principle we have stated, to be taxed. It is said, however, by counsel for the state, that the interior department has never de-

manded the costs of surveying the lands within the orlginal ten-mile limit, in cases in which they *have* issued patents, and do not claim them in those for which no patent has been issued. That as the non-payment of these costs, therefore, is no impediment to demanding and receiving the patents, the equitable title is complete, and they should be held subject to taxation.

We held, however, in the case of Railway v. Prescott, *supra*, that these costs of the survey attached to all the lands granted to the road, whether by the original act or by the amendatory act of 1864, and we have no sufficient evidence before us that the department of the interior has acted on a different principle. If, however, they have done so heretofore, it is not for us to say that they *will* grant patents *hereafter* without payment of these costs; and in a case where we are called on to decide whether such costs are lawfully demandable before the legal title of the company is perfect, we must abide by our own construction of the statute.

It is said, however, that these lands have been mortgaged by the company under sanction of the act of Congress on that subject, and that the mortgage conveys the legal title out of the United States, so that her rights can no longer be interposed to protect them from taxation.

It is not necessary to go into the merely technical question whether the legal title passed from the United States by virtue of that mortgage, and the act of Congress which authorized it, nor whether, if it ever becomes necessary to foreclose that mortgage, the rights of the United States in the land would be divested by the proceeding, because we are satisfied that the United States, until she conveys them by patent or otherwise, has an interest, whether it be legal or equitable, which the state of Nebraska is not at liberty to divest by the exercise of the right of taxation.

Under these views we are of opinion that the state had no right to tax the lands for which the cost of surveying had not been paid, and for which no patent had been issued; and as the decree of the circuit court was made in conformity with these principles, it is affirmed.

NOTE.—The substance of the opinion of the circuit judge on the vitally important question, whether the lands of the Pacific Roads (an empire in extent) are taxable by a state, is given *ante*, vol. 1, CENTRAL LAW JOURNAL, p. 349.

Proof of Foreign Marriages at Common Law.

JACOB HUTCHINS v. GOTTLIEB KIMMELL.

Supreme Court of Michigan, January 12, 1875.

Hon. BENJ. F. GRAVES, Chief Justice.
" ISAAC P. CHRISTIANCY, } Associate Justices.
" JAMES V. CAMPBELL, }
" THOMAS M. COOLEY. }

1. **Proof of Foreign Marriages**.—A foreign marriage is *prima facie* established by proof of the ceremony, the certificates of which may be put in evidence without first proving the foreign law on the subject.

2. **Common Law of Marriage.**—It may be assumed that a general common law on the subject of marriage prevails in all Christian countries.

Kimmell sued Hutchins, in case, for criminal conversation with Philopena Kimmell, his wife. The principal assignment of error related to the proof of the marriage.

Opinion of the court by COOLEY, J.

The marriage was alleged to have taken place in the Kingdom of Wurtemberg, and the evidences of it consisted in the following certificate:

(a.) The certificate of Ferdinand Haug, describing himself minister of the Evangelist Lutheran Church at Winesbergh, in the Kingdom of Wurtemberg, that on the register of his religious denomination of which he has charge, there is recorded the marriage of John Gottlieb Kimmell and Sabrina Philopena Bauchle, born Utz, performed by the minister Shelling, pastor of the society, who had lawful authority to perform the same. (b.) The certificate of the judge of the High Court of Winesbergh, of the Kingdom of Wurtemberg, that the certificate of the minister, Haug, is genuine and entitled to credit, and that the marriage certified to was "in due form and properly solemnized." (c.) The certificate of the chief chancellor of the department of justice, in attestation of that of the judge of the High Court of Winesbergh. To this was also added the certificate of the American consul, but that is immaterial.

All these certificates were objected to when offered, on various grounds, which in the argument in this court are narrowed down to the following:

First. Because they were not accompanied by any proof of the foreign law regulating marriages in Wurtemberg; and *second*, because it is not sufficient that a ceremony was performed purporting to be a marriage, unless it is also shown that such ceremony was recognized by, and in accordance with the law of the country, where it took place. We take these objections as they are presented in the brief of counsel for the plaintiff in error, rather than as they were made below, because we have a right to suppose that, as there given, they point out all the errors in law supposed to have been committed in their reception, and that they have been framed with deliberation with a view to calling our attention to the precise point which is designed as the subject of our examination. It will be perceived that no point is made upon the proof, by these certificates or otherwise, of the fact of a ceremony of marriage between the parties named in the minister's certificate, but the objections are narrowed to this: That there is no proper and legal showing of what was the law of Wurtemberg on the subject of marriage, and consequently it does not appear that the ceremony perfected a legal marriage. The point is that proof of the ceremony alone was not proof of the marriage until the law was shown which would make it such.

It is not disputed that in a case of this nature an actual marriage must be proved. Such evidence of cohabitation and reputation as would be sufficient in other civil actions, will not suffice where it is sought to fix upon a woman a charge of adultery. Addison on Torts, 698; 2 Greenl. Ev., § 461; 1 Bish. Mar. and Div., § 442, 4th Ed. But had the supposed marriage taken place in this state, evidence that a ceremony was performed ostensibly in celebration of it, with apparent assent and co-operation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule as we have stated it. Fenton v. Reed, 4 Johns. 52; Jackson v. Winne, 7 Wend. 47; Starr v. Peck, 1 Hill, 270; Rose v. Clark, 8 Paige, 574; Matter of Taylor, 9 Paige, 611; Clayton v. Wardell, 4 N. Y. 230; Cheney v. Arnold, 15 N. Y. 345; O'Gara v. Eisenlohr, 38 N. Y. 296; Pearson v. Howey, 6 Halst. 12; Hantz v. Sealy, 6 Binn. 405; Commonwealth v. Stump, 53 Penn. St. 132; Newbury v. Brunswick, 2 Vt. 151; State v. Rood, 12 Vt. 396; Northfield v. Vershire, 33 Vt. 110; Duncan v. Duncan, 10 Ohio St., 181; Carmichael v. State, 12 Ohio St., 553; State v. Patterson, 2 Ired. 346; Londonderry v. Chester, 2 N. H. 268; Keyes v. Keyes, 2 Fost. 553; B. a Slave, v. State, 1 Yerg. 177; Grisham v. State, 2 Yerg. 589; Cheseldine v. Brewer, 1 H. & McH. 152; State v. Murphy, 6 Ala. 765; Potier v. Barclay, 15 Ala. 439; Dumaresly v

Fishly, 3 A. K. Marsh. 368; Graham v. Bennett, 2 Cal. 503; Case v. Case, 17 Cal. 598; Patton v. Philadelphia, 1 La. Ann. 798; Holmes v. Holmes, 6 La. Ann. 463; Hallett v. Collins, 10 How. 174.

Such being the law of this state, it remains to be seen whether the rule can be applied to a marriage contracted in a foreign country, in the absence of any evidence showing what is the law on the subject of marriage in such foreign country.

The general rule of law is, that a marriage valid where it is celebrated is valid everywhere; but the converse to this is equally general, that a marriage void where it is celebrated is void everywhere. As every country is at liberty to make regulations of its own on the subject, which other countries must respect and by which they must in general judge of the validity of a marriage contracted where the regulations prevail, and as these regulations may, and often do, require something more than the mere consent of the parties, it may follow in any case that a presumption of marriage, based upon such facts merely as would be sufficient to establish one, if contracted here, would be a presumption against the fact, and would support a marriage which the local law would condemn and the local courts would refuse to recognize or support.

All presumptions, however, are liable to be contrary to the fact, but they attend us at every point in our examinations of facts, and it is impossible to dispense with them. They do not in general preclude the facts being brought forward to overthrow the presumptions, but they supply imperfections where the facts are not fully developed, and they determine, in many cases, which party shall take upon himself the burden of showing what are the facts bearing upon the point in controversy. And in the case before us, the question is not whether the foreign ceremony of marriage, followed by cohabitation, makes out, beyond dispute, a valid marriage, but whether it does not show one *prima facie* valid, so as to call upon the party disputing its validity, to point out the impediments, if any, which rendered it ineffectual.

A formal ceremony of marriage, whether in due form or not, must be assumed to be by consent, and therefore *prima facie* a contract of marriage *per verba de præsenti*. Fleming v. People, 27 N. Y. 329. And where the local law is not shown, the argument in its favor is that marriage between parties capable of contracting it, is of common right, and valid by a common law prevailing throughout Christendom. Regulations restrictive of this right, or imposing conditions upon it, are exceptions; they depend on local statutes, and as in other cases of exceptions, if one claims that a case falls within them, the burden is upon him to show the fact. *Prima facie*, a good marriage is shown when the contract is proved with cohabitation following it, and we cannot assume that there are regulations restrictive of the common right, until they are shown. Whart. Confl. L., § 170–173; Bish. Mar. and Div., § 521–528, 4th Ed. Upon this question it has been said by Chief Justice Parker, of Massachusetts, that, a marriage *de facto* being proved, it is but reasonable that it should be presumed to be according to the law. "As if a marriage were proved to have taken place in France, for instance, it should seem fit to require the party who denies the marriage to prove its invalidity." Raynham v. Canton, 3 Pick. 297. And in the case of People v. Calder, decided at the last July term of this court, it was said of a marriage contracted in another state: "When the evidence shows that the parties appeared at a church, and that the officiating minister then publicly, and in the presence of other persons in attendance performed a ceremony of marriage between such parties, and further, that the parties appeared to regard themselves as then married, it is fairly to be presumed, in the absence of anything to the contrary, that the ceremony was regular and legal, although the evidence fails to show what words were used by the parties or the minister, or the particulars of the ceremony, or what specific kind of ceremony was, or would be, according to the forms, usages or customs of such church." This is likewise the doctrine of Steadman v. Powell, 1 Add. 58, where the proof of an Irish marriage did not go beyond that which may be made in this case, and did not negative the fact that the celebration might have been by a popish priest, which, by the local law, would have rendered it invalid. It has been held in this state that the common law, as it exists among us, will be presumed to prevail in a foreign country, in the absence of proof to the contrary. High. Appellant, 2 Doug. (Mich.) 515; Crane v. Hardy, 1 Mich. 56. And though it may be questionable if this doctrine is to be applied universally, it cannot be disputed that the reason of it is applicable to all marriages celebrated in Christian countries, in which it may properly be assumed that a general common law on the subject of marriage still prevails. Whart. Confl. L. § 171. And as has been well said, the inconvenience of adhering to more rigid rules in the proof of foreign marriages, would, in a country so largely populated by immigrants as is ours, be peculiarly great, and put courts and litigants to useless trouble and expense in every instance. Bish. Mar. & Div., § 528, 4th Ed. Polygamous and incestuous marriages, celebrated in countries where they are permitted, are nevertheless treated as invalid here, because they are condemned by the common voice of civilized nations, which establishes a common law forbidding them; and the same reasoning which condemns them, must sustain the marriages by mere consent, which the same comomn law presents and sanctions. Whart. Confl. L., § 180. And especially should this be the case where the parties, after taking such steps abroad to constitute a marriage as would be sufficient under our laws, remove afterwards to this country, and in apparent reliance upon the marriage and the protection our laws would give it, continue for many years to live together as husband and wife, recognizing, as there is every reason to believe they did, the validity and binding obligation of the marriage for all purposes. If these views are correct, proof of the ceremony of marriage did *prima facie* establish it, and the court did not err in holding that it was not necessary to prove the foreign law before putting the certificates in evidence.

Federal Taxation—Action against Bank for Penalty—Necessary Allegations.

UNITED STATES v. THE STATE NATIONAL BANK OF MINNEAPOLIS.

United States Circuit Court, District of Minnesota, December Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. RENSSELLAER R. NELSON, District Judge.

1. **Federal Taxation—Action against Bank for Penalty—What the Petition must Aver.**—In an action by the United States against a bank, for the penalty of one thousand dollars, for failing to make return of its net earnings, incomes or gains, as required by the 120th section of the internal revenue act of June 30, 1864 (as amended by the act of July 13, 1866), which was re-enacted July 14, 1870, the complaint must allege that the sum therein mentioned as net earnings, income and gains, was dividends, or excess of profits over such dividends, added during the year to its surplus or contingent fund. The complaint should specifically state the character of the earnings, income, and gains which were liable to the tax, and that a list and return thereof has not been made as required in this section

2. **The same.**—If the penalty is claimed under the 120th section of the act of 1864 the complaint should charge that the defendant has neglected or omitted to make dividends or additions to its surplus or contingent fund, within the period of time mentioned therein, and that it had failed to make the return required by that section.

The United States bring this suit to recover a penalty of one thousand dollars against the defendant, for not making or rendering a list or return to the assessor, of its net earnings, income or gains for the period of time embraced between January 1, 1870, and June 30, 1870. A demurrer is interposed by the defendant.

The penalty is claimed by virtue of the act of Congress, entitled "An act to reduce internal revenue taxes and for other purposes." Approved July 30, 1870, 16 Stats. at Large, 261.

The 17th section of this act enacts: "That sections 120, 121,

etc., * * of the act of June 30th, 1864, * * * as amended by the act of July 13th, 1866, * * * * * * shall be construed to impose the taxes therein mentioned, to the first day of August, 1870, but after that date no furthert axes shall be levied or assessed under said sections, and all acts or parts of acts relating to the taxes herein repealed, and all the provisions of said acts shall continue in full force * * * * * for maintaining and continuing * * penalties incurred under and by virtue thereof, etc."

The ninth section of the internal revenue act of July 16, 1866, United States Statutes at Large, Volume 14, page 138, amended the 120th section of the act of June 30, 1864, by striking out all after the enacting clause and inserting the following:

"That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable to stockholders, policyholders or depositers or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, saving institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States, or territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds, and said banks, trust cumpanies, saving institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said tax of five per centum, and a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of the taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form or manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution or insurance company making such default, shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or returns, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal; provided, that the tax upon the dividends of life insurance companies shall not be deemed due until dividends are payable; nor shall the portions of premiums returned by mutual life insurance companies to their policy-holders, nor the annual or semi-annual interest, allowed or paid to the depositors in savings institutions, be considered as dividends."

The 121st section of the act of June 30th, 1864, referred to in the 17th section of the act of July 11, 1870, U. S. Statutes at Large, Volume 13, page 284, enacts:

"That any bank legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a list or return in duplicate, under oath or affirmation of the president or cashier, to the assessor or assistant assessor of the district in which it is located, on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued or been earned or received by said bank, during the six months next preceeding said first days of January and July, and shall present one of said lists or returns, and pay the collector of said district a duty of five per centum on such profits; and in case of default to make such list or return and payment within the thirty days as aforesaid, shall be subject to the provisions of the foregoing section of this act. Provided, that when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

Lochren, *McNair* and *Gilfillan*, for defendant; *W. W. Billson*, U. S. Attorney, for plaintiff.

NELSON, J:—The demurrer must be sustained. If the penalty is claimed for a failure to make a return in accordance with the 120th section of the internal revenue act of June 30th, 1864 (as amended by the act of July 13th, 1866), which was re-enacted July 14th, 1870, the complaint should have alleged that the sum therein mentioned as net earnings, income and gains was dividends declared or excess of profits over such dividends added during the year to their surplus or contingent fund. This is manifest, for the section imposes a tax upon two subjects: *first*, dividends due and payable; *second*, undistributed sums or excess over dividends which had been carried to a surplus fund. See Savings Bank v. U. S. 19 Wallace, 235. The complaint should, therefore, specifically state the character of the earnings, income and gains which were liable to a tax, and that a list and return thereof had not been made as provided in this section.

If the penalty is claimed under the 121st section of the act, the complaint should have charged that the defendant had neglected or omitted to make dividends or additions to its surplus or contingent fund within the period of time therein mentioned, and had failed to make the return required by this section.

Only the earnings, income and profits of the defendant, not thus disposed of, were subject to a tax, and the penalty could only be maintained in case of a default of the president or cashier of the bank to make a list or return of such profits and payment of the tax imposed, on the first day of July, or within thirty days thereafter.

The act of Congress of July 14, 1870, not only imposed the tax mentioned in the 120th and 121st sections above referred to, but also continued in force all the provisions of said acts for maintaining and continuing the penalties incurred under and by virtue thereof. This act virtually re enacted the 120th and 121st sections, and the right of Congress to pass such a statute, retroactive in its effect, was declared by the supreme court, in the case of Stockdale v. Insurance Company (see Internal Revenue Record, Volume 19, page 170).

An order will be entered sustaining the demurrer, with leave to the plaintiff to amend the complaint within twenty days after service of the same upon the district attorney.

DILLON, Circuit J., concurs.

Charging Graveyards with the Cost of Paving Streets.

CITY OF LOUISVILLE v. JOSEPH NEVIN.

Court of Appeals of Kentucky, January 27, 1875.

A municipal corporation has no power to charge a cemetery with the cost of grading and paving an adjacent street, and a court of equity will not decree a sale of a lot in such a cemetery to enforce such a lien.

Appeal from the Louisville Chancery Court. The facts are stated in the opinion of the court, which was delivered by COFER, J., as follows:

The appellee (Nevin) brought this suit in the Louisville Chancery Court to enforce an alleged lien on a lot of ground on the south side of Jefferson street, in said city, for the price of regrading, recurbing and repairing the sidewalk along the front of the lot.

The lot was conveyed by the city, in 1834, to be held in trust for the use of the Roman Catholic congregation, in Louisville, as a burying-ground, and has been filled with graves for more than twenty years, and has never been used, since 1834, for any other purpose than as a grave-yard, and it is admitted that no revenue is derived from it, and that the Right Reverend Bishop McClosky, who now holds the title as trustee, has no funds in his hands belonging to the trust with which to pay the assessment.

The sole question, therefore, is whether the lot can be sold to satisfy the claim of the contractor for work, which is admitted to be a lien, unless the property is in some way exempted from it.

It is insisted for the trustee that the lot is exempt from assessment under section 10 of an act entitled "an act to tax railroads, turnpike roads and other corporations, in aid of the sinking fund," approved Feb. 20, 1864. Myers' Supplement, page 482.

But we need not decide whether that act would have the effect claimed for it or not, as, in our opinion, the judgment dismissing the petition, so far as it was sought to sell the lot, must be affirmed upon a more obvious ground.

The lot having been completely filled with graves, and thus rendered useless for any other purpose than as a resting-place for the dead, unless their graves are to be desecrated by being built over or dug up, or by the use of the property for the ordinary purposes of town lots, the chancellor would hesitate to lend his aid to subject it to sale.

We know it has been intimated by courts, for whose opinions we have a very high regard, that this is a matter of sentiment with which courts have nothing to do; but fortunately we are not reduced to the alternative to decree the sale of a grave-yard already filled with the ashes of the dead, or of seeming to refuse to carry out the commands of the law.

The chancellor will not decree that to be sold which cannot be lawfully used for the ordinary purposes to which property of a like character is commonly applied, and especially when there is no imaginable beneficial use to which it can be put by the purchaser which would not subject him to punishment under the penal statutes of the state.

Section 26, of article 17, of chapter 29, of the general statutes, reads as follows: "Any person who shall willfully mutilate the graves, monuments, fences, shrubbery, ornaments, grounds or buildings in or enclosing any cemetery or place of sepulture, or shall violate the grave of any person by willfully destroying, removing, or injuring the head, or foot-stone, or the tomb over, or the enclosure protecting any grave, or by digging into, or plowing over, or removing any ornament, shrubbery or flower placed upon any grave or lot, shall be fined not less than ten, nor more than one hundred dollars, or imprisoned not exceeding six months, or both, as a jury may determine."

If the lot in question was sold, the purchaser could not use it for any of the purposes for which town lots are ordinarily used, without subjecting himself to the penalties denounced by the foregoing statute, and making the court a *particeps criminis* in his offence.

If it be said that the purchaser must take care of himself, it will be a sufficient answer that the court ought not to offer that for sale which it will not allow to be used by the purchaser for any purpose that can be of the slightest value to him.

The city had complete authority to contract for the work, but had no authority to make it a charge on the abutting property, and is, therefore, liable to the contractor for the price of his work. Murphy v. The City of Louisville, 9 Bush.

Wherefore the judgment is AFFIRMED.

—AN important case has been argued before Mr. District Judge Krekel, in the United States Circuit Court, at Jefferson City, involving the question of the validity of the ante-dated county bonds.

Reserved Seats in Theaters.

DISTRICT OF COLUMBIA v. SAVILLE *ET AL.*

Supreme Court of the District of Columbia, General Term, September, 1874.

Hon. DAVID K. CARTTER, Chief Justice.
" ABRAM B. OLIN,
" ANDREW WYLIE,
" ARTHUR MCARTHUR,
" D. C. HUMPHREYS,
} Justices.

The general assembly of the District of Columbia passed an act providing, that after opening for the reception or entertainment of persons attending any theatrical exhibition, public show or amusement of whatever name or nature, within the District of Columbia, for which money or other reward is in any manner demanded or received, it shall be unlawful for any person or persons to sell or dispose of, or to permit the disposal of such tickets or seats so as to reserve particular seats, in either portion of said show, theater or exhibition, to any individual, or to mark or describe as reserved or taken any seat or seats which have not been reserved by the sale of tickets therefor, previous to the opening of such exhibition, show, or place of amusement: *Held*, that this was an unwise, vexatious and unlawful interference with the rights of private property, which it was beyond the power of the legislature to enact.

The facts appear in the opinion of the court.

Edwin L. Stanton, for the District of Columbia.

The enactment of the legislative assembly, under which defendants are arraigned, is constitutional.

The power to regulate, as well as to license, occupations and amusements has been repeatedly conferred upon municipalities by state legislatures, repeatedly exercised and always upheld by the courts. The power may be more liberally exercised in respect of public amusements and exhibitions than in the case of occupations. 1 Dillon on Municipal Corporations, sections 93, 291, 292; Cooley on Constitutional Limitations, 572.

The very enactment in question in this case, against the sale of reserved seats, after the beginning of a theatrical performance, is drawn from a similar ordinance passed in the city of Cincinnati.

R. T. Merrick and *M. F. Morris*, for defendant.

The right of property means the free, absolute, and uncontrolled right to use, enjoy, and dispose of property; and the right of disposal is as absolute as that of use and enjoyment. 1 Blackstone's Com. 138; 2 Kent's Com. 320, 326; Bouvier's Law Dict., title *property*; Wynehamer v. The People, 13 N. Y. 396.

The restrictions upon the right apart from those contained in revenue laws, which have always been held to be exceptional in their character, are reduced to the head of "police regulations," and may be summed up in the one maxim, "*Utere tuo ut alieno non laedas*:" "Use thine own in such manner that thou wilt not injure that of another."

Legislative restrictions on the rights of property are valid only when they are demanded for the protection of the public health, the public peace, the public safety, or the public morality. There is no pretense that the enactment in question is demanded by any one of these considerations; it is not claimed to have any such scope. It is a plain attempt of this legislative assembly to compel a man to use his property, not according to his own views, but according to the views of others; and it cannot be defended upon any ground of public policy. The practice complained of, and against which the act is directed, does not conflict with any public or private right, and is not therefore the rightful subject of legislation.

Mr. Justice OLIN stated the case, and delivered the opinion of the court.

This cause comes before us upon a certificate of the justice holding the criminal court, as is claimed under and in pursuance of the 5th section of the act of March 3, 1863, organizing the Supreme Court of this District. See 12 U. S. Statutes at Large, p. 763.

The facts in the case are these:

An information was filed in the police court of this district, to enforce the provisions of an act of the legislative assembly of the district, passed June 23, 1873, entitled an act to regulate shows and exhibitions, "*in the sale and disposal of seats.*" The act is as follows:

Be it enacted by the legislative assembly of the District of Columbia, that after opening for the reception or entertainment of persons attending any theatrical exhibition, public show or amusement, of whatever name or nature within the District of Columbia, for which money or other reward is in any manner demanded or received, it shall be unlawful for any person or persons to sell or dispose of, or to permit the sale or disposal of such tickets or seats, so as to reserve particular seats in either portion of said show, theater, or exhibition, to any individual, or to mark or describe as reserved or taken, any seat or seats which have not been reserved by the sale of tickets therefor, previous to the opening of such exhibition, show, or place of amusement.

The second section of the act, requires the act to be printed, *framed*, and posted in some conspicuous place on the door of the theater, or other place of amusement.

The third section imposes a fine of not less than $5, nor more than $10 for a violation of this act.

The offence, if any was committed, consisted in a violation of the provisions of the first section of the act. This section as applied to the case before us, stripped of unnecessary verbiage, is to this effect: No proprietor of a theater shall, after the door of such theater is open for the reception of spectators, sell tickets so as to reserve particular seats, or to mark or describe as reserved or taken, any seats which have not been reserved *by the sale of tickets therefor*, previous to the opening of such exhibition. In short, the provision is, that when the doors of the theater are opened for the reception of spectators, whoever purchases a ticket to enter the same, may plant himself in any unoccupied seat he can discover, unless the proprietor can convince him that the seat he had selected, had been sold prior to the time of opening the doors of the theater for the reception of spectators, or at least before the commencement of the exercises, and this without reference to the fact whether the spectator purchased a ticket for twenty-five cents, which would entitle him to a seat in the upper gallery, or whether he paid the price of the most desirable seat in the house.

Indeed, if this law can be enforced, it is made a penal offence for the manager or proprietor to reserve for the use of his friends or patrons a few desirable seats, who, he thinks, by their presence and approbation, might give success to his entertainment.

He cannot, however, reserve these seats if not sold before the commencement of the exhibition. Nay, under this section, the proprietor or manager of a theater could not reserve his private box for himself and family, without incurring the penalty imposed in the third section of the act.

The provisions of the act are attempted to be justified, on the ground that it is a mere police regulation, and as such, within the competence of the late legislative assembly to enact. We are all of the opinion that the act has nothing whatever of the character of a police regulation, but on the contrary that it is an unwise, vexatious and unlawful interference with the rights of private property.

The information filed in this case should be quashed.

—[*Washington Law Reporter.*

Some Recent Decisions in Bankruptcy.

POWER OF BANKRUPT COURT TO COMPEL BANKRUPTS TO DISGORGE HIDDEN PROPERTY.

In re Salkey and Gerson, U. S. D. C., N. D. Ill., Blodgett, J., January, 1875.

On examination of the bankrupts, under provisions of § 26, it appeared that they had begun business with a stock worth $11,000; that subsequent, and prior to the adjudication, they bought additional stock to the value of $23,000; that when the assignee took possession, their stock was not worth over $9,000, and the bankrupts made no attempt to account for the deficiency: when asked what had become of the remainder of their stock, they stated, in substance, that they had no further account to give.

After referring to § 26, and citing and commenting upon *Ex parte* Bradbury, 78 Eng. Com. L. R. 15; *Ex parte* Nowlan, —— D. & E., p. 58; Taylor's Case, 8 Vesey, 328; and *Ex parte* Lord, 16 M. & W. 462, the court said that the case of a bankrupt was similar to that of a defendant in a creditor's bill when he would be required to surrender his assets to a receiver, and for a failure can be punished for contempt,—and a refusal of a party in a chancery suit generally to obey an order subjected him to punishment. The district court in bankruptcy had like powers to those of a court of chancery. When a person is adjudicated bankrupt he is bound to surrender his property, and, if he fails to do so, he may be punished. So the delegation to the court of power to require an account to be given of all matters relating to the disposal by the bankrupt of his estate, implied a power to punish for contempt for failure to do so. If the bankrupt failed to satisfy the court that he had rendered a full and complete account, he would be liable to punishment. Not that the court could capriciously or unreasonably insist on unnecessary explanations, but it must be satisfied, after examination, that the bankrupt had given a full account. But such power in courts of chancery should be sparingly exercised.

The bankrupt law contained no special authority to commit for refusal to answer or account, but the principle seemed to be contained in the cases which touched on the subject, and clearly involved in the United States law. In the present case the bankrupts substantially said that they had $20,000 of goods between January and October, for which they refused to account, and told the court and creditors to do what they could to help themselves. Could a court then sit and be baffled by such acts?

The administration of bankrupt estates was in the main unsatisfactory enough at best, but how much worse would it necessarily be were there no power to unearth concealed assets, and compel bankrupts to disgorge their hidden property. Surely, a court could not be contented with finding out such a fact, but the court had power to enforce the surrender of the property, if it appeared to the satisfaction of the court that it was still in the control of the bankrupts themselves, or so far secreted that there was no disclosure to show that any other person had possession of it.

It also appeared in evidence that the goods gradually disappeared from the shelves of the bankrupts, and that, on creditors requiring to know where such goods had gone, the debtors laughed at them, and asked the familiar question: "What are you going to do about it?"

The conclusion, therefore, was inevitable that the bankrupts had privately made away with the goods, as the books showed no entry of credit sales. An order would, therefore, be issued for the arrest of Salkey and Gerson for contempt of court.

PRACTICE UNDER AMENDMENT OF 1874—CONTROL OF BANKRUPT COURT OVER ACTION IN STATE COURT—HABEAS CORPUS.

In re Williams and McPherson (U. S. C. C., W. D. Wis., Drummond, J., 11 N. B. R. 145), decides the amendment of June 22, 1874, being retrospective as to pending cases before adjudication, that the petition could be amended so as to relate back to the commencement of proceedings; that, as the bankrupts consented to the adjudication, the non-joinder of the requisite number and value of creditors was an irregularity which the bankrupts might waive; that the bankrupt court had control of the action of the state court in a suit commenced by a creditor on the day when the petition in bankruptcy was filed, and could protect the bankrupt from arrest, even though the creditor's demand were one which the proceedings in bankruptcy would not affect; and suggests, that in such a case, a writ of *habeas corpus* is the proper remedy.

STOPPAGE IN TRANSITU—RECISSION OF SALE.

In re Foot *et al.* U. S. C. C., N. D. N. Y. Woodruff, J. 11 N. B. R. 153. The bankrupts had, before bankruptcy, bought salt, to be paid for in cash, on receipt of invoice, and to be shipped by canal. On its way the boat was stopped by ice, and the salt was landed and stored. Bankrupts gave warehouseman conditional authority to sell, and a small portion was sold. In the meantime, and before the salt unsold was again moved, the purchasers, not having paid for the salt, became bankrupts. The vendor, with the consent of the bankrupts, took possession of the salt, except the small portion which had been sold, and gave credit to the bankrupts for the same, at the price which the bankrupts had agreed to pay. This resumption of possession and ownership held not to be an illegal preference, but a proper exercise of the right of stoppage *in transitu*; and that the non-payment, on receipt of invoice, warranted a rescission of the sale.

PREFERENCE—RATIFICATION.

A. and R. Strain, P. E. v. R. N. Gourdin *et al.* (U. S. C. C., S. D. Geo., Woods, J., 11 N. B. R. 156), is a suit by an assignee in bankruptcy to recover from defendants the amount of a certificate of deposit as a preference. The bankrupts being bankers, and holding money of defendants on deposit, procured the certificates of deposit of another banking house, payable to order of defendants, notified defendants of their failure, and pursuant to instructions, placed the certificate of deposit to the credit of defendants, in the Southern Bank of Georgia. It appeared that the bankrupts acted under legal advice, to the effect that, unless they provided for the payment of their depositors, they would be liable to a criminal prosecution. Payment, thus effected, held to be a preference under § 35; and that procuring certificates of deposit, payable to the value of defendants, and before knowledge on their part of the insolvency of bankrupts, was not a payment, though subsequently ratified by defendants, since before the ratification the rights of third parties (viz.: the other creditors) had intervened. E. T. A.

Correspondence.

"CURIOSITIES OF THE LAW REPORTERS."

ABERDEEN, MISS., Feb. 5, 1875.

EDITORS CENTRAL LAW JOURNAL:—In the "Curiosities of the Law Reporters," in your No. of January 29, is cited as a *curiosity* the saying of one of the *learned* judges of the Tennessee Supreme Court: "The same doctrine is to be found in Bracton, *Lord* Bacon, Bacon's Abridgment, and was a maxim of the civil law."

Just where the joke comes in here, I am too dull to see.

I presume it would not be difficult to find the same doctrine of law in Bracton's Treatise—it Lord Bacon's Maxims—in Matthew Bacon's Abridgment—and in the works of the civil law.

If the "*curiosity*" consists in calling Francis Bacon, "*Lord*" Bacon instead of "Baron Verulam," or "Viscount St. Albans"—it is a "*curiosity*," so common as to cease to be one;—one which has the sanction of so distinguished an authority as *Macaulay*, who says: "History has refused to degrade 'Francis Bacon,' into '*Viscount St. Albans*.'" E. H .B.

NOTE.—We recall a palpable blunder under this head in preface to Paschal's Texas Digest of Decisions, where the learned author, in grandiloquent language, says: "However heavy might be the expense and severe the labor, I determined to publish a work more exhaustive than the Digest of Comyn or the Abriegment of *Lord* Bacon."—[ED. C. L. J.

Notes and Queries.

I. MECHANIC'S LIEN ON RAILROAD.

LOUISVILLE, KY., Jan'y 30th, 1875.

EDITORS CENTRAL LAW JOURNAL:—By special act of our Kentucky legislature (1869) for the benefit of mechanics "who perform labor or furnish materials, fixtures or machinery for constructing, finishing, altering, adding to or repairing any house, building, mill, manufactory, *or other structure*," within the city of Louisville, county of Jefferson, a lien is given upon the structure to mechanics and all persons doing such work, and such lien "shall be *prior* and *superior* to *all other* liens *or encumbrances* upon the interest of the employer in the lot or parcel of land built upon, and upon any previous *structure* so altered, repaired or added to, created after the commencement of constructing the house, building, mill, manufactory, or other *structure*, or adding to, altering or repairing a previous *structure*."

Query: Does this act give a lien to a contractor who repairs and completes an arch in a railroad tunnel so as to preserve the rock in the tunnel from crumbling upon such railroad or tunnel, prior and superior to a previous mortgage? If so, what court has so decided? COURT PLACE.

ANSWER.—The cases which we have examined would seem to point to a negative solution of this question. Although a railroad may be a "structure," within the meaning of the above statute, yet is the road in question a structure "within the city of Louisville?" If a portion of it lies without that city, the case would seem not to be within the statute; since that part of it which lies within the city could not be sold without greatly impairing the usefulness of the whole.

The principal reason for assuming that a railroad cannot be the subject of a mechanic's lien, is, that a railroad is a public agency, and public policy is to some extent concerned in preventing the mischief which would result from selling it in pieces or sections to enforce liens for slight improvements.

Thus, it was held in Dunn v. North Mo. Railroad, 24 Mo. 493, that a mechanic's lien did not attach to a railroad built under the authority of the state, and to which the state had loaned its credit. The court, through Scott, J., said: "After the immense responsibility the state has assumed in building this and other railroads for the public use and convenience, it would be unreasonable to suppose that a power remained in any individual to deprive the public of the benefit contemplated by them. * * * It is said that it is better to suffer a mischief peculiar to one, than an inconvenience peculiar to many. But this is no mischief to the plaintiff. He would subject the public to this great inconvenience, not because the public is in debt to him, not because he has not the same remedy for his debt that every other member of the community has, but that he may enjoy a privilege conferred on no other class in society."

In McPheeters v. Merimec Bridge Co., 28 Mo. 465, the same court carried the principle still further. The Merimec Bridge Company had been incorporated by the legislature of Missouri, with the privilege of erecting a bridge across the Merimec river, at or near a ferry, connecting with the public highways, and with power to exact toll from passengers. It was held that a material-man who had complied with the terms of the mechanic's lien law, had no lien upon the company's bridge, because (1) it was a *public highway*, and, the material being the property of a private corporation, could not be sold so as to pass with it the franchise; for the franchise of a private corporation is not assignable without the assent of the legislature; and (2), because the lien law contemplated an interest in the land as its foundation; and the bridge company had no interest in the land except an easement which inhered in its franchise, and which was hence incapable of assignment. Therefore, a sale of the bridge would necessarily involve its destruction and removal, and this would prejudice the public interests, and contravene the purposes of the legislature in incorporating the bridge company and bestowing the franchise upon it. It was intimated, however, that a *private* bridge might be the subject of a mechanic's lien.

So, it was held in Foster v. Fowler, 60 Penn. St. 27, that the necessary buildings, etc., of a corporation, created for the purpose of introducing water into a town to supply its inhabitants, are not the subject of a mechanic's lien.

So, it has been frequently held that public buildings cannot be the subject of such a lien. Ripley v. Gage County, 3 Nebr. 397; Chicago v. Hasley, 25 Ill. 595; Brinkerhoff v. Board of Education, 37 How. Pr. 520; Wilson v. Commissioners, 7 Watts & Serg. 197; Thomas v. Board of Trustees, 1 Monthly Western Jurist, 356. But see Board of Education v. Greenbaum, 39 Ill. 609.

II. A UNITED STATES DIGEST.

BRUNSWICK, GEORGIA, February 3, 1875.

EDITORS CENTRAL LAW JOURNAL:—We desire to address the following enquiries to you, and receive an answer in next issue of your journal, if you think it entitled to space:

1st. Is there a digest published of all the decisions rendered in all the state and United States courts?

2d. If there is no such digest, why would it not be a paying enterprise for some able lawyer to consolidate the digests of reports of the supreme courts of the states and the Supreme Court of the United States? and why would not such a digest be a very valuable addition to any lawyer's library, placing

within his reach, in a condensed form, the decisions of each of said courts upon the legal questions raised in his practice? Yours very truly,

GOODYEAR & HARRIS.

ANSWER.—The United States Digest, published by Messrs. Little, Brown & Co., of Boston, purports to be a digest of the decisions of all the courts within the United States, and this it doubtless is. The original volumes of this great work, and all the supplements down to 1870, are being consolidated, under the editorial management of that greatest of digest-makers, Benjamin Vaughn Abbott, Esq. The second series of this work, by the same editor, commences with the year 1870, and will be extended down in annual volumes until another consolidation shall have become necessary. This work being in the field, another work of a similar character would not, in our judgment, be a paying enterprise.

RIGHT OF COMPENSATION FOR SUPPORT OF STEP-CHILDREN.

EUGENE CITY, OREGON, January 28, 1875.

EDITORS CENTRAL LAW JOURNAL:—"A" marries "B" who is a widow and has three children. These children have estates of their own and a regular guardian. A. takes them to his own home, board, clothes and educates them at his own individual expense. They are all now of age. Can he recover for maintenance? ENQUIRER.

ANSWER.—In the absence of statutes to the contrary, it is well settled that a step-father is not entitled to the custody and earnings of his step-children, nor is he bound by law to maintain them. 2 Kent Com. 192; Tubb v. Harrison, 2 Term R. 118; Freto v. Brown, 4 Mass. 675; Worcester v. Marchant, 14 Pick. 510; Com. v. Hamilton, 6 Mass. 273, 275; Bond v. Lockwood, 33 Ill. 212; Gay v. Ballou, 4 Wend. 403; Schouler Dom. Rel. 321. But if the step-father voluntarily assumes the care and support of the step children, he stands *in loco parentis*, as to them, and the presumption obtains that they deal with each other as parent and child, and not as master and servant, and neither compensation for board is permitted on the one hand, nor for services on the other. Stone v. Carr, 3 Esp. 1; Cooper v. Martin, 4 East, 77; Williams v. Hutchinson, 3 Comst. 312; Sharp v. Cropsey, 11 Barb. 224; Murdock v. Murdock, 7 Cal. 511; Gillett v. Camp, 27 Mo. 541; Hussey v. Roundtree, Busbee Law (N. C.) 110; Lantz v. Frey, 14 Penn. St. 201; Davis v. Goodenow, 27 Vt. 715; Brush v. Blanchard, 18 Ill. 46; Schouler Dom. Rel. 378.

Book Notice.

THE AMERICAN REPORTS: Containing all decisions of general interest in the courts of last resort of the several states. By ISAAC GRANT THOMPSON. Vol. 12. Albany: John D. Parsons & Co. 1874. pp. 777.

We have before had occasion to express our high opinion of these reports. Whether considered with reference to their intrinsic excellence or practical usefulness, it is our deliberate judgment, that they are exceeded by no series of Law Reports ever published in this country. They are edited with conscientious care and consummate ability. In about two volumes a year, the profession get nearly all the current adjudications of great or permanent value, or general interest in the highest courts of the several states. Next to the decisions of the supreme court of his own state, and the Supreme Court of the United States, the practitioner can find no reports so useful as these. Many of the cases are annotated by the learned editor,—which serves to give them much additional value. J. F. D.

Recent Reports.

MISSISSIPPI REPORTS, VOL. 49. (Harris & Simrall, Vol. 1). Reports of cases in the Supreme Court of Mississippi, containing cases determined at the October term, 1873, and April term, 1874. By G. E. HARRIS and G. H. SIMRALL. Jackson: Pilot Publishing Co. 1874.

Were it not for the indulgence with which the reporters, in their preface to this volume, entreat the public to deal with their first attempt, there would doubtless be very many faults found in it by the profession, and many complaints made, not in the substance or its arrangement, but in the mechanical execution of the work, which, it must be confessed, is not worthy either of the state, the court or the reporters, and which is doubtless a source of regret to all who feel interested in the matter.

An incompetent proof-reader has it in his power to ruin the effect of the most able editorial labor, and this seems to have been the chief difficulty, with which the reporters had to contend. Typographical errors abound throughout the volume, some of them so glaring as to require pen and ink correction, in order to make the matter intelligible. This, of course, is the fault of the publishers, and while the reporters cannot be blamed in this instance, they will be held inexcusable by the profession, if they do not, in their next volume, engage careful and competent publishers, who will do them and their work justice.

The subject of inserting arguments of counsel is mentioned in the preface, and the example of their predecessors is relied on by the reporters in excusing the practice. We are inclined to the opinion that no excuse is needed where sound discretion is exercised in the condensation of briefs contemplated by the statute, and although in some instances the space occupied in this way does not seem to be quite so judiciously distributed among the several briefs presented by the record, as to give the highest degree of satisfaction to the bar of the state, yet, in this very difficult task the reporters have evidently exercised great caution and discrimination, and there should be no general complaint.

Among the many important and well-considered causes decided, we note the following:

Landlord and Tenant—Rent Payable in Produce.—When the value of produce, agreed upon as the price of the rent, is fixed or easily ascertainable, distress will lie for the rent.

Where the rent agreed to be paid for land was "one bale of cotton weighing five hundred pounds for every twenty acres," *held*, that although the value of the cotton was not fixed, yet that it has a certain commercial value, quoted daily by telegraph throughout the country, like stocks or coin, and therefore, the value of the rent was easily ascertained by calculation. Brooks v. Cunningham, p. 108.

Right of Dower in Premises occupied by Tenant under Unexpired Lease.—A widow claimed dower in lands which had been leased by her late husband for a term of years, with express stipulations in the lease contemplating its continuance, notwithstanding the death of the lessor. The statute provides dower in all lands, etc.," of which the husband shall die "seized and possessed," or which he had before conveyed otherwise than in good faith and for a valuable consideration, and whereof the widow had not relinquished her right of dower.

Held, that such lease was not such a conveyance as in contemplation of the statute would entitle the widow to claim dower *adversely* to the lessee, nor was there such a conveyance, disseizin and transfer of possession as to cut off the dower.

The lease contained in substance articles of co-partnership between lessor and lessee, in the conduct of the leased premises, as a plantation, and the widow was decreed to be entitled, pending the lease, to one-third of that portion of the net profits of the partnership business to which the husband would have been entitled. Sykes v. Sykes, p. 190.

Bankrupt Act—Jurisdiction of State Court—The primary jurisdiction over all matters in bankruptcy, and all property of the bankrupt, is given to the federal court, but when no action is taken by a lien-creditor or assignee in that court to foreclose the lien, the state court may proceed to do so.

Bankrupt's Discharge, operates only as an absolution of personal obligation. Reed, Admr., v. Bullington, p. 223.

Deed—Acknowledgment by Wife.—Where the husband and wife appeared at the same time and acknowledged the execution of the deed, but the separate and distinct and complete examination and acknowledgment of the wife is not taken and certified to, the acknowledgment is insufficient. It cannot be aided by reference to the certificate of acknowledgment of the husband, but must stand or fall by itself. Robinson v. Noel, p. 253.

Master and Servant—Liability to Servant for Damage Caused by Negligence of Fellow servant.—Suit by employee of railroad company, a locomotive engineer, for damages sustained in an accident caused by the "spreading" of the track, owing to the unsafe condition and construction of the road-bed. The *evidence* is given (in abstract) in this case; a feature which in proper cases and judiciously controlled, adds great value to the report. The case was ably argued, and the authorities, English and American, critically reviewed and discussed by the court in its opinion.

Held, that the general doctrine to be deduced from the decisions of the English, and most of the American courts, is that a servant accepting employment for the performance of specified duties, takes upon himself the ordinary perils incident to the service, of which are exposures from negligence of fellow-servants in the same common employment. In Ohio and Kentucky the rule has been modified so as to fix liability upon the master, only when the servant injured was under the control of a superior, whose negligence caused the damage.

The statute in Iowa holds the railroad companies liable for damages sustained by "any persons," including employees of the company.

The conclusion in this case, seems to be, that if the master employed competent servants to keep the road-bed in repair, and they *afterwards became incompetent*, and the plaintiff knew of such incompetence without giving notice

of it, this would excuse the master from liability, but the opinion would have been much more satisfactory if the conclusions of the court had been stated with more distinctness.

A very important case of this character was decided in 2 Dillon, C. C. R. 259 (see 1 CENT. L. J. 39), where the rule mentioned above as obtaining in Kentucky and Ohio is adopted. The case was afterward affirmed by the Supreme Court of the United States. 1 CENT. L. J. 118; Ibid., 112, see also C. B. & Q. R. R. Co. v. Dickson, 63 Ills. 151.

Liability of Common Carriers for Loss Occasioned by Vis Major—Who may Sue.—The Southern Express Company, in December, 1861, and January, 1862, undertook to carry money-packages from Holly Springs, Miss., to Bowling Green, Ky. The federal forces were known to be then investing Bowling Green, which was occupied by the confederates, and a battle was daily imminent. The packages were not delivered, but carried to Nashville, where they were seized by the federals on their occupancy of that place. The communication by railroad, between Bowling Green and Holly Springs, was not interrupted until the 14th day of February, 1862.

The court held, in effect, though not in terms, that the carriers were liable for the loss.

It was also decided, after a very extended examination of the authorities, that the consignor was the proper party to bring the suit. So. Ex. Co. v. Craft, p. 480.

Will—Renunciation under Foreign Will—Construction of Will.—A citizen of Louisiana died, leaving a will disposing of his estate in that state, but not disposing of certain lands in Mississippi. The widow applied for dower in the Mississippi lands, claiming that as to them the husband died intestate.

Held, that the will could not have been probated in Mississippi, because it disposed of no property in Mississippi; that the common rule, that the widow could not, by the act of the husband, be deprived of dower, and that she must elect, to take under the will, or renounce the will and retain her right of dower only when the devise was expressly declared in the will, to be in lieu of dower, is reversed in Mississippi, and every devise is construed as in lieu of dower unless otherwise expressed in the will, but gives her the privilege of renunciation and election; and that this statute does not apply to a foreign will, especially in this case, when the law of Louisiana gives the widow no privilege of election; that when the right to election does not exist, the statute which construes a devise to be in lieu of dower, ought not to apply; and, finally, that the effect of the Louisiana will was, as to the property in that state, to give the widow the whole estate; and there being in effect no will in Mississippi, the Mississippi property is subject to the ordinary rules of descent and distribution, which would entitle the widow to dower therein. Wilson v. Cox, p. 538.

Bankrupt Act—Jurisdiction of State Courts.—The state courts have no jurisdiction to enquire into the sufficiency or validity of a judgment of the bankrupt court discharging a debtor. Their jurisdiction may extend to the enquiry whether a debt was or not affected by such discharge.

The syllabus to this cause is unfortunate in simply giving, as clauses 2 and 3, the language of certain sections of the bankrupt act, without advising the reader what, if any, ruling or *dicta* were declared by the court thereon. Stevens v. Bowen, p. 597.

Confederate Money—Contract Payable in—Measure of Damages.—The note sued on was as follows:

"$1140.00. JACKSON, MISS., 2d June, 1862.

On or before the first day of March, 1864, we promise to pay to Darcey & Wheeler, or order, $1140.00, for value received, same being for money loaned, with eight per cent. interest after maturity, until paid, payable in such money, currency or funds as will be generally received for debts in this country, at maturity of this note.

(Signed) "R. & B. SHOTWELL."

Held, that the proper measure of damages was the value of confederate money at the time the note was given—not at the date of its maturity. Darcey & Wheeler v. Shotwell, p. 631.

Carrier—Right to Limit Liability—Negligence.—So frequent are the cases on the liability of carriers becoming, that there must soon be, in each state, as elaborate laws for their government as are now of force on the subject of insurance. The wonder is, that more legislation, good, bad and indifferent, has not been had on this subject.

In this case, the carrier, a railroad company, sought exemption from liability for cotton burned while in transit, on the usual grounds that the loss was caused by inevitable accident, and that a clause in the contract of affrieghtment protected the carrier against loss by fire; and the court awarded a new trial on the ground that the question of fact, whether, notwithstanding the exemption of the carrier by notice or contract, there was not still negligence in performing the carriage, so as to incur liability, ought to have gone to the jury. M. & O. R. R. Co. v. Weiner, p. 725.

The long and bitter contest between the carriers and their patrons, on the question of liability, has given rise to so much litigation, that there is scarcely any firmly settled rule on any one of the various questions which constantly arise; and the courts seem to find it necessary, in each case, to go over and over again the same ground, reviewing and balancing the authorities, and seeking to find where the weight of authority really is, a matter of no little difficulty.

Exemption—Waiver of—Law impairing Obligation of Contract.—When the whole of a valuable plantation was levied on and offered for sale by sheriff, the owner gave the sheriff a notice to be read at the sale, stating that she claimed 240 acres thereof as exempt, and the sheriff read the same and recited it in his deed to the purchaser, it was *held*, that failure to proceed formally to have the premises claimed as exempt, designated and set apart, was not a waiver of the exemption. It was the duty of the sheriff to appoint freeholders to set apart the premises claimed as exempt.

The act of the legislature, increasing the amount of the exemption after the debt under which the sale was made was incurred, *held*, to be a law impairing the obligation of a contract. Lessley v. Phipps, p. 790. [See Cockran v. Darcy, 1 Cent. L. J. 179; Ibid., p. 249.]

Husband and Wife—What Constitutes Marriage—Constitutional Legalization of Cohabitation.—The complainants, brother and sister, claiming to be the children and heirs at law of one Dickerson, a white man, who died Feb. 2, 1871, leaving property, filed their bill setting forth that Mary Ann Dickerson, a negress, one of the respondents, is the mother of complainants; that their mother and father had never been married, because at the time when their intercourse commenced, marriage between them was prohibited by law, but that "their father loved their mother with all the ardor and devotion of a true lover, and while the laws of the state forbade the solemnization of the marriage rites between them, they were married in heart and by the laws of nature and of love; that their father and mother lived and cohabited together as husband and wife; that the complainants were the fruits of this union, and were always recognized by their father as his children, and they lived with him and their mother, and continued to honor and obey him as their father until his death; that the intercourse between the father and mother of complainants began in 1855 and continued until his death; that he never attempted to marry any woman of his own color; that he remained true to his love, and when the bonds of slavery were stricken from their mother, and the new constitution of the state legalized all such marriages of love by declaring that all persons who have not been married, but are now living together and cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, and their children, whether born before or after the ratification of this constitution, shall be legitimate, that their father and mother continued to live together as before, until the ratification of the constitution; that their father joyfully embraced this opportunity of doing justice to her who had been so many years the partner of his bosom, and to the children of his loins; that after he had seen the provisions of the constitution, and knew the effect of a continuance of his intercourse with their mother, he rejoiced that a public ceremony of marriage would be unnecessary; that he could thus, in a quiet and unobstrusive manner legalize his intercourse with their mother into matrimony; that they continued to live together and cohabit as husband and wife, until the new constitution was ratified; that a brother of their father and one Brown, have obtained possession of all the personal property of their father," etc., and praying relief.

Argued for the complainants: That no particular form is necessary to constitute marriage in Mississippi; that this principle is not changed by any statutory regulation prescribing such form; that no statutory regulations are essential to the validity of a marriage unless the statute proceeds to declare void all marriages not solemnized in accordance with its terms; that nothing, therefore, but the woman's legal incapacity prevented this from being a valid marriage in the first instance; that such incapacity was removed in the lifetime of Dickerson, (1.) by the 14th amendment to the constitution of the United States, which made her a citizen and protected her in her rights; and, (2.) by the act of the legislature of June 14th, 1870, repealing old laws relating to slaves, which forbade such marriages, and such incapacity being removed, subsequent cohabitation constituted a valid marriage; and that by the provisions of the new constitution of Mississippi, providing that "*all persons* who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, and their children, whether born before or after the ratification of this constitution, shall be legitimate, and the legislature may, by law, punish adultery and concubinage," [Art. 12, § 22.], the marriage between the father and mother of complainants became absolutely legalized, and complainants became the lawful children and heirs of Dickerson, and entitled to share in the distribution of his estate.

Argued for the respondents, that the status of the father and mother was not at any time a legal one, but one criminal in its nature, and knowingly so, contrary to the law of the state and good morals—and that no legislation or constitutional provision can make that innocent which has once been criminal, so as to affect acts done; that these persons could not have been able by this kind of intercourse to constitute it a valid marriage even if there had been no statutory prohibition, without holding themselves out to the world as man and wife, which they never did; that it could not have been in contemplation by the makers of the new constitution to encourage such proceedings by the enactment of Art. 12, § 22, or of the legislature to legalize such marriages by the act passed to legalize the existing *de facto* marriages which were found to obtain among the colored people; that on the contrary, the convention which framed the constitution, as is shown by the context, had in contemplation two classes of persons instead of one, and that the words "*all persons*," construed in connection with the last clause of the section, must be held to mean the class of persons in whose interest this particular clause was deemed necessary, viz: the blacks, who had been deprived by the condition of slavery of the benefits of marriage, and *not* such persons as had been long indulging in an open and wanton violation of a penal statute; and that *these last*, among whom are to be reckoned the father and mother of complainants, were directly affected by the last clause of section 22, providing that the legislature should have power "to punish adultery and concubinage."

The court, after reviewing the authorities as to what constitutes a legal marriage, and declaring that with the adoption of the new constitution, former impediments to marriage between whites and blacks ceased, and that however much people might differ as to questions of policy or propriety, the court can only declare legal rules, and "matters of taste and propriety, like this, the people must determine for themselves," *held*, that the provisions of the new constitution were intended to apply to all classes, "without regard to race, color or previous condition of servitude," and when it said "all persons," it did not mean its provisions to apply to less than all; that "such constitutional action was expedient and wise, it legitimated offspring and settled a rule which could scarcely be confided to legislation with the certainty of satisfactory solution;" and concluded, that if these parties were "cohabiting as husband and wife," at the time of the adoption of the present constitution, and if with a knowledge of its provisions, they mutually assented to the relation, then their marriage was consummated and their children legitimated. The cause, which came up on error as to a decree sustaining demurrer, was remanded for answer. Dickerson v. Brown, p. 357.

Only the unique and unprecedented facts in this remarkable case could excuse us for devoting so much space to it. We forbear comment, except to note that it would seem as if the framers of the Mississippi constitution in their earnest desire to establish "equal rights for all," had, perhaps inadvertently, *enacted too much*, and thus contributed to the perpetuation and legalization of some of the most flagrant evils which characterized the institution of slavery.

C. A. C.

Summary of our Legal Exchanges.

AMERICAN LAW TIMES REPORTS (NEW YORK, HURD & HOUGHTON), FOR FEBRUARY.

Constitutional Law—Effect of the XIIIth and XIVth Amendments upon the Sovereign Powers of the States—A State may Provide for the Education of White and Colored Children in Separate Schools.—Cory v. Carter, Supreme Court of Indiana, November, 1874, opinion by Buskirk, J. [2 Am. L. T. R. (N. S.), 76.] The only case in this number of the American Law Times Reports, which we have not already noticed in other periodicals, is the celebrated Indiana colored school case, which has excited so much comment in the political journals. The following is the syllabus:

A state statute provided, in substance, that a school tax should be levied without regard to the race or color of the owner of the property taxed; that all children, without regard to race or color, should be included in the enumeration for school purposes, the colored children to be enumerated in separate lists, and separate school-houses, and teachers to be provided for them. In the event of there not being a sufficient number of colored children in any district to warrant the erection of a school-house and the employment of a teacher for their separate use, it was made the duty of the proper officers to consolidate adjoining districts, or otherwise provide for the education of such children, their full proportion of the school revenue to be expended for their benefit. *Held:* 1. That the act was not an infraction of the section of the constitution of the state which provides that the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which shall not equally belong to all citizens.

2. That it was not an infraction of the section of the constitution of the state which provides for the establishment of a uniform system of public schools, equally open to all.

3. That it was not in conflict with section 2 of article 4 of the constitution of the United States, which declares that the citizens of one state shall enjoy the privileges of citizens in the several states.

4. That it was not in conflict with the thirteenth or fourteenth amendments of the constitution of the United States, nor any of the amendments of earlier date; nor with the act of Congress known as the "Civil Rights Bill."

Held, also, that the thirteenth and fourteenth amendments do not impose limitations upon the powers of the states to fix, secure and protect the rights, privileges and immunities of their citizens as such, of whatever race or color they may be. That the only restrictions which said amendments impose upon the sovereignty of the states are (1) to prevent slavery; (2) to prevent negroes or mulattoes being deprived of national rights; (3) to compel the states to recognize negroes or mulattoes as their citizens; (4) to compel the states to give to negroes or mulattoes the same rights which their white citizens enjoy.

THE AMERICAN LAW REGISTER (PHILADELPHIA, D. B. CANFIELD & CO.), FOR DECEMBER.

Studies in the Law of the Statute of Frauds, by Henry Reed. [13 Am. L. Reg. (N. S.) 721.] This article, which has been continued from a former number (p. 602) appears to exhibit much research. The following subjects are considered: III. Indemnities for becoming guarantor or bailsman. IV. Whether an agreement which can be performed on one side within a year, but not on the other, is within that section of the statute which provides that "no action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof." V. As to what contracts, on the one hand, are for the sale of any goods, wares and merchandise for the price of, etc., and within the statute; as to what contracts, on the other, are for work and labor, and without the statute.

Exempting Manufacturing Establishments from Taxation.—Brewer Brick Co. v. Inhabitants of Brewer, Supreme Judicial Court of Maine, opinion by Appleton, Ch. J. [12 Am. L. Reg. (N. S.) 735.] This case resembles the Iola Bridge Co. sup. case, 2 Dillon C. C. 353, and Allen v. Jay, 12 Am. L. Reg. (N. S.) 481. The following is the syllabus:

It is for the legislature to determine what property, real and personal, shall be subject to and what shall be exempt from taxation.

Exemption of property from taxation is the imposition of increased taxation upon the non-exempt property.

The legislature cannot constitutionally transfer to municipal corporations the power of determining upon what property, real or personal, taxes shall and upon what they shall not be imposed.

Where the constitution of the state requires taxes, voted by the legislature, to be assessed upon all taxable property in the town, or district, subject to the tax, ratably, or in proportion to the value of the estate or in any other similar manner, it is not competent for the legislature, with the assent of towns, where real estate is situated and liable to taxation, to provide, even by a general law applying to the whole state, that manufacturing establisments, going into operation after the date of the statute, and the consent of the town, together with the capital invested in such establishments, shall be exempt from taxation, while other similar establishments, already existing in such towns, remain subject to such tax. Such exemption is, virtually, the levy of an increased tax upon all the taxable estate in the town, and to that extent, depriving the owner of its value without any equivalent benefit, either directly or indirectly.

It is essential to all just taxation that it be levied with equality and uniformity.

In a note to this case, Judge Redfield says: "The country have great cause for thankfulness when the courts oppose such firm aud just resistance to the attempts of interested parties to induce the legislature to usurp, for the benefit of such parties, those arbitrary modes of distributing unequal favors through the abuse of the power of taxation."

Power of Debtor to waive Benefit of Exemption Laws.—Maxley v. Ragnun, Kentucky Court of Appeals, opinion by Pryor, J. [12 Am. L. Reg. (N. S.), 743.] This case holds that a debtor cannot, by an executory contract, such as a stipulation in a promissory note, waive the benefit of the state exemption laws, so as to estop himself from subsequently claiming the exemption. The same ruling will be found in Knittler v. Newcomb, 31 Barbour, 170. A contrary view was taken by Mr. Chief Justice Waite, in the case of Solomon, 1 CENT. L. J. 318. Compare Dow v. Cheney, 103 Mass. 181. Judge Redfield, in a note to the case we are noticing, commends the conclusion of the court as being sound and just.

Injunction Issued on Sunday.—Langaber v. Fairbury, &c., R. R. Co., Supreme Court of Illinois, opinion by Breese, Ch. J. [12 Am. L. Reg. (N. S.). 747.] This is an old case, determined, we believe, about two years ago, and which has been resurrected, we presume, because of its exceptional interest. The syllabus is as follows:

Although Sunday is *dies non juridicus* at the common law, and although the statute of Illinois prohibits all secular employment on that day, yet in special cases where public policy, or the prevention of irremediable wrong requires it, the courts may sit on that day and issue process.

An injunction issued on Sunday to prevent a railroad company from taking possession of a public street in a town, without having made compensation to property-owners who would be injured thereby, sustained.

Appended to the case is a very learned and interesting note by a person signing himself J. P. B., on the maxim, *dies dominicus non est juridicus*, in which the writer dissents from the learned chief justice, on the ground, that in deciding as he did, he disregarded an established rule of the common law. We think that in deciding as he did, he displayed the good sense which has attended his judicial labors for a quarter of a century. He probably thought that if the Savior of men could perform a work of necessity on *Saturday*, the scriptural sabbath, he might venture to issue an injunction on *Sunday* to prevent a railroad corporation from overriding the rights of the people.

A Criticism.—We notice that the American Law Register does not give the date at which the decisions which it publishes were pronounced. This, we cannot avoid thinking is a practice which ought to be reformed, for reasons which will suggest themselves to every one. If opinions reach the editor of the Register in the state in which they reach us, he is obliged, in each instance, to scratch out the designation of the term of the court at which they were rendered, in order to present them as he does. The omission cannot, hence, be attributed to negligence; but it looks rather like a weak commercial device for palming off old decisions upon its readers as new ones.

AMERICAN LAW REGISTER, FOR JANUARY.

Good-Will.—The January number of the American Law Register contains the commencement of what appears to be a valuable paper on the subject of the "good-will" of business establishments. On the question what is the correct definition of good-will, and in what it may consist, the writer cites Cruttwell v. Lye, 17 Ves. 335; Churton v. Douglas, John. Ch. 174; Kennedy v. Lee, 3 Meri. 452; Wedderburn v. Wedderburn, 2 Beav. 84; Chissum v. Dewes, 5 Russ. 29; Dougherty v. Van Nostrand, 1 Hoff. 68; Williams v. Wilson, 4 Sandf. Ch. 379; Elliott's Appeal, 10 P. F. Smith, 161; Gibblett v. Read, 9 Mod. 460; Bradbury v. Dickens, 27 Beav. 53; Hogg v. Kirby, 8 Vesey, 215; Bell v. Locke, 8 Paige, Ch. 75; Holden v. McMakin, 1 Pars. Eq. 270; Rodgers v. Nowill, 3 DeG., M. & G. 614; S. C. 6 Hare, 325; Farina v. Silverlock, 3 DeG., M. & G. 214; Partridge v. Mench, 2 Barb. Ch. 101; Austin v. Boys, 2 DeG. & J. 626; Farr v. Pearce, 3 Mad. 74; Howe v. Saring, 19 How. Pr. 14; Lewis v. Langdon, 7 Sim. 421; Banks v. Gibson, 11 Jurist, Part 1, 680.

The writes also cites, on the general proposition that the good-will of a firm is one of the partnership assets and valuable, Macdonald v. Richardson and Richardson v. Marten, 1 Gif. 81; Banks v. Gibson, 11 Jur., Pt. 1, 680; Johnson v. Helleley, 34 Beav. 63; Williams v. Wilson, 4 Sand. Ch. 379; Mellersh v. Keen, 28 Beav. 453; Bradbury v. Dickens, 27 Beav. 53; Austin v. Boys, 2 DeGex & Jones, 626; Turner v. Major, 3 Gif. 442; Wedderburn v. Wedderburn, 22 Beav. 84; Willett v. Blandford, 1 Hare, 271; Holden v. McMakin, 1 Pars. Eq. Cas. 270; McFarlan v. Stewart, 2 Watts, 111; Musselman's App., 6 P. F. Smith, 81; Dougherty v. Van Nostrand, 1 Hoff. 68; Case v. Abeel, 1 Paige, 401; and Marten v. Van Schaick, 4 Paige, 479.

Statute of Limitations—Verbal Promise to Pay barred Debt—"Promissory Note not Negotiable."—Currier v. Lockwood, Supreme Court of Errors of Connecticut, opinion by Seymour, Ch. J., and by Foster J. [14 Am. Law Reg. (N. S.), 12.] A writing in these words, "Due C. & B. seventeen dollars, value received, F. L.," does not import an express promise to pay, but is merely an acknowledgment of indebtedness, from which the law implies a promise to pay. It is not, therefore, a "promissory note not negotiable," within the statute which fixes the limitation to actions upon obligations of that description. [Two judges dissenting]

Where the debtor, after the debt was barred by the statute, said to the creditor, "I will give you a ton of coal for the note," which offer was not accepted, it was held that it was a mere offer of compromise, and not such an acknowledgment as would take the case out of the statute of limitations.

Where the debtor, at another time, said to the creditor, "Have you that note? I wish to settle it," the creditor replying, "It is in the hands of S. and you can settle with him," to which the debtor rejoined, "The note is outlawed and good for nothing, and you can go ahead if you want to;" which declarations the court below held not to be sufficient evidence of a new promise, it was held that the court committed no error of law in so deciding.

Judge Redfield, in an interesting note to the above named case, dissents from the conclusion of the court as to the instrument in suit being a promissory note. From the cases he cites, it appears that the following instruments have been held good promissory notes:

"Borrowed of J. S., 50*l*., which I promise never to pay." Simpson v. Vaughn, 2 Atkins, 32.

"For value received of C. & M., or order, thirty dollars and eighty-three cents on demand and interest annually." Cummings v. Gassett, 19 Vt. 308.

"Due John Allen, $94.91, on demand." Smith v. Allen, 5 Day, 337.

"Due S., or bearer, $340 for value received with interest." Sackett v. Spencer, 29 Barb. 180.

"Due A. B., or order, $20, on demand." Carver v. Haynes, 47 Me. 257.

"Due G. S. W., five hundred and twenty-five dollars." Jacquin v. Warren, 40 Ill. 459.

"Good to bearer." Hussey v. Winslow, 59 Me. 170.

"Many similar cases," adds Judge Redfield, "may be found both in this country and in England, and there are few looking in any degree in the opposite direction. The decisions in England seem to treat I. O. U.'s, when no time of payment is named, as not amounting to promissory notes. But these cases may be regarded as resting upon peculiar grounds. It is well understood there to be a form of contract or symbol passing among gentlemen as evidence of merely honorary debts, and to require them to be stamped, would be inconsistent with their character."

Criminal Procedure—Quantum of Proof to Establish Defence of Insanity.—The State v. Crawford, Supreme Court of Kansas, opinion by Valentine, J. [14 Am. Law Reg. (N. S.) 23] In a criminal action, where the defence of insanity is set up, it does not devolve upon the defendant to prove that he is insane, by a preponderance of the evidence; but if, upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case under the evidence, there should be a reasonable doubt as to whether the defendant is sane or insane, he must be acquitted. The case of The State of Kansas v. Boyle, 10 Kansas, with regard to the effect of repeals of statutes, in criminal cases, referred to and followed.

To this case an exceptionally good note is appended by a writer signing himself R. S. H. We wish this writer had signed his full name. He gives in this note such clear proofs of a fine legal mind that the profession will, we are sure, wish to make his acquaintance. 1. From this note it may be concluded that in England the established doctrine is, that the prisoner must make out the defence of insanity *to the satisfaction of the jury*. McNaughton's Case, 2 Cl. & F. 200; Regina v. Stokes, 3 C. & K. 188; Regina v. Taylor, 3 Cox C. C. 155; Regina v. Laeron, 4 Cox C. C. 149.

2. That in America, the following cases hold that the defence of insanity must be established *beyond a reasonable doubt*. State v. Spencer, 1 Zab. 796; State v. Huting, 21 Miss. 477; Bonfante v. State, 2 Minn. 123; Clark v. State, 12 Ohio, 495.

3. That the following cases support the doctrine that the prisoner must show a preponderance of evidence in favor of his insanity: Com. v. Eddy, 7 Gray, 584; Com. v. York, 9 Metcf. Mass, 93 (leading case); State v. Starling, 6 Jones, N. C. 366; State v. Brandon, 8 Jones, N. C. 465; People v. Myers, 518; Com. v. Heath, 11 Gray, 303 (idiocy). To these we may add a recent decision of the Supreme Court of Pennsylvania, opinion by Agnew, Ch. J., which we expect to publish next week.

4. The following cases support the doctrine of the Kansas court, and hold that it is sufficient for the prisoner to raise in the minds of the jury a reasonable doubt as to his sanity: State v. Bartlett, 43 N. H. 224; Polk v. State, 19 Ind. 170; Hopps v. People, 31 Ill. 385; Ogletree v. The State, 28 Ala. 701; United States v. McClare, 7 Law Rep. (N. S.) 439; State v. Marler, 2 Ala. 43; State v. Bringyea, 5 Ala. 241. The Kansas court also cite, in support of their doctrine, Chase v. People, 40 Ill. 224, 228; Stevens v. State, 31 Ind. 485; People v. Gorbut, 17 Mich. 21, 23; People v. McCann, 16 N. Y. 58, 64; Smith v. Commonwealth, 1 Duvall (Ky.), 224, 228; Ogletree v. State, 28 Ala. 693.

To our mind the conclusion of the Kansas court seems most consonant with reason; and the tendency of the courts seems to be in favor of this rule. It is a flat contradiction for the law to say in one breath that a prisoner is entitled to an acquittal, if there be a reasonable doubt of his guilt, and in the next breath, that if the defence is, that the prisoner was insane at the time he did the act, he must establish this by a preponderance of evidence, or, what is worse, beyond a reasonable doubt. If he is entitled to acquittal upon a reasonable doubt of his guilt, why should he not be permitted to raise that doubt by evidence tending to show insanity, as well as by evidence tending to establish any other defence? And how can the judge, without invading the province of the jury, instruct them what quantum of proof shall be sufficient to raise that doubt?

Liability of Express Company for Loss of Goods caused by Fire in Railroad Accident.—Bank of Kentucky v. Adams Ex. Co. This case was published in our issue for September 3 of last year (1 CENT. L. J. 436), and we recur to it now for the purpose of saying that the American Law Register, in publishing it, adds to it a valuable note by Judge Redfield, in which he dissents from the views of Judge Ballard on the second proposition involved in the case, namely, that an express company which receives goods to carry, is not responsible for damages caused by accidents originating in the negligence of the servants of the railroad company over whose road such express company conveys the goods entrusted to it.

Legal News and Notes.

—THE Supreme Judicial Court of Maine has granted four hundred and eighty-seven divorces during the present year.

—THE Supreme Court of Missouri adjourned its term at Jefferson City on the first instant, and will sit at Saint Joseph, on the third Monday of this month.

—THE three new republican United States senators from the west—Christiancy, of Michigan, Paddock, of Nebraska, and Cameron of Wisconsin, are all natives of the state of New York.

—GENERAL CHESTER HARDING, who for more than a quarter of a century, has practiced law at the St. Louis bar, died at the residence of his brother-in-law, Judge John M. Krum, on Washington avenue, in this city, on Wednesday last. His health has been delicate for a year or more.

—THE London Paper Trade Journal, proposes a compromise on the international copyright question, substantially to the effect that any publisher in the United States, shall have the liberty to reprint, but requiring him to give the author a royalty of 10 per cent., which is copyright without the exclusive right.

—IN Udderzook v. Com., opinion by C. J. Agnew, we noted the uses of the art of photography for the purposes of identification. In the case of Tryon and Dull v. Gamble *et al.*, a brief note of which we have given elsewhere, the art was put to another use. The defendant's *scire facias*, which was issued on the Wollstonecraft mortgage, March 23, 1829, and which had become to be a much worn document was photographed by G M. Bretz, popular photographer of Pottsville. Copies were printed very distinctly from the negative, and used with the paper-books at the argument of the case in the supreme court.—[*Legal Chronicle.*

—W. M. B. HARTLEY, one of the most prominent lawyers of Canada, died suddenly at his residence in Montreal on the 1st inst. He was a graduate of Yale Law School, and resided for some years on this side of the border at Hartford, where he filled the position of secretary to the Colt Arms Manufacturing Company. He was of an adventurous spirit, and at one time became a follower of Garibaldi, having been in the trenches with him before Palermo in 1855. He had also been a successful stock operator on Wall street, and was at one time American vice-consul at Liverpool.

—IN the case of the state against Lack, for murder in Franklin county, tried at the recent term of the Supreme Court of Missouri at Jefferson City, the judgment has been reversed and the case remanded on the ground of the refusal of the circuit court to grant defendant a change of venue. The present law requires the affidavit for a change of venue to be supported by the affidavits of other competent witnesses. In this case the application for Lack was supported by two witnesses, attorneys of Washington, Franklin county. The circuit court held that attorneys at law were not competent witnesses in such cases. The supreme court overrule this doctrine, and declare that attorneys are equally competent with other witnesses, and that this was not proper ground upon which to refuse a change of venue.

—COUNSEL for defendants in error, in Sexson v. Kelley, 3 Neb. 104, arguing upon the insufficiency of a liquor-sellor's bond to cover "*all* damages" accruing to the obligees, and seeking to establish the principle that a party suing on such bond must, if he recover at all, recover according to its terms, strictly, quotes as his ***only authority***, the following from the Merchant of Venice:

> "Tarry a little;—there is something else.
> This bond doth give thee here no jot of blood;
> The words expressly are a pound of flesh.
> * * * * * * * * *
> Shed thou no blood; nor cut thou less nor more;
> But just a pound of flesh."

—AMONG the cases disposed of by the Supreme Court of Missouri, at its recent session at Jefferson City, was that of the state against Harper, under indictment for selling liquor without state and county license in the city of Carthage. The plea of the defendant was that he had a license from the authorities of Carthage which superseded the necessity of obtaining a state and county license, and was a bar to any prosecution. The court is said to have decided that a legislative act authorizing the state and county to levy a tax is of higher authority than a city ordinance, and that the charter of the city of Carthage, although granted subsequent to the dram-shop act, in its provisions regulating dram-shops, does not repeal the operation of the dram-shop law in the city of Carthage; that the two acts, the charter and the dram-shop act, not being incompatible with each other, both of them have a right to regulate dram-shops. A number of cases in the southwest depend upon the decision in this case.

—LEGAL PUNISHMENT FOR NEGLIGENCE has been inflicted by a New Jersey court. Some months since a collision took place between two freight trains on the branch of the Pennsylvania Railroad which leads to Harsimus Cove freight docks in Jersey City, and a man was killed. The accident was caused by the neglect of the telegraph operator at the junction with the main line, who should have held one of the trains there until the other had passed, but who failed to do so. This operator, John S. McClelland, was subsequently indicted for manslaughter by the grand jury, and was last week tried in the Hudson county court and found guilty. On the 15th ult. the judge sentenced him to pay a fine of $250. A somewhat similar case was tried in New Jersey several years ago, when a switch-tender, through whose neglect to close a switch, a train was thrown from the track and a man killed in Newark, was tried for manslaughter, found guilty and sent to the state prison. So it seems that in New Jersey at least some punishment can be inflicted on careless railroad employes, at any rate when human life is lost through their neglect.—[*Railroad Gazette.*

—DR. KENEALY.—The case of Dr. Kenealy, who has been disbarred and removed from the office of Queen's Counsel, because of his action in the Tichborne case, is, as we learn from the English papers, exciting much sympathy. One newspaper says "that there is a strong feeling among members of the bar that the special offence for which he has been cut off from the exercise of his profession" has been too severely punished, and that his offences, "however odious and reprehensible," do not come within the jurisdiction of the benchers who have disbarred him. Some friends of the Doctor announce that in the event of this decision being confirmed, he will leave London and take up his residence in America. The special offence of the Doctor was the writing of articles in the newspapers abusing the judges before whom he practised. It was held that, being an officer of the law, charged with the administration of justice, his attacks upon the bench were calculated to bring justice into contempt, and were really a serious form of blackmailing. The question whether a lawyer can honorably pursue such practices is one deeply important, not only to the bar in England, but in America. We shall await the decision of the judges with interest. If they restore Dr. Kenealy to his position as Queen's Counsel and member of the, bar it will be a declaration that the independence of the lawyer is of higher consideration than the etiquette of the profession. Whatever the legal result of this trial may be, Dr. Kenealy has been so severely condemned, morally, that he can scarcely live in England as an efficient member of the bar.—[*New York Herald.*

—IN the case of Arthur, collector of New York v. Richard & Iselin, which involved the value of the franc in invoices of foreign goods, Justice Bradley has delivered the opinion of the supreme court to the effect that the statute of March 3, 1873, governs the case, and that the terms of that statute are quite clear and its meaning unmistakable. They are, that the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of the standard value. This basis of comparison excludes debased or abraded coin of diminished value, and makes the coin of full standard value, and the amount of pure metal therein the basis for ascertaining the value of foreign money. The gold coins of different countries are properly used for this purpose where they exist, because gold has become the principal medium of international exchange. According to this rule, the French franc, compared with United States coin, is worth nineteen cents three mills, as ascertained by the superintendent of the mint, and published by the secretary of the treasury. This is the value contended for by the government. The statute was evidently intended to be general and mandatory, and is inconsistent with previous statutes fixing different values. The second section of the act, in fixing the value of the pound sterling, adopts precisely this principle of comparing the amount of pure metal in standard coins of the two countries, and declaring that such valuation shall be used in the custom-houses, as well as the valuation of contracts. This corroborates the view that the first section is to have the same interpretation.